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General Principles of EU Law

The Ghost in the Platonic Heaven in Need of Conceptual Clarification

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Abstract

General principles are en vogue in EU law – and in need of conceptual clarification. A closer look at several concepts of principle in legal philosophy and legal theory sheds light upon the concept of general principles in EU law. A distinction between an aprioristic model of principle and a model of principle informed by legal positivism may contribute to clarifying the genesis of a (general) principle in EU law, as well as its nature and functions. This paper demonstrates that an evolution has taken place from a reliance on seemingly natural law inspired reflections of general principles via the desperate search to ground general principles in various kinds of sources based on a more or less sound methodology towards an increasing reliance on strictly positivistic approaches. Against this backdrop, general principles are likely to lose significance where there are other norms while retaining an important yet uncontrollable role where the traditional canon of sources is silent.

Keywords: *European Union law; General principles of EU law; legal interpretation EU law; teleology*

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General Principles of EU Law

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Constanze Semmelmann¹

Introduction

Recent cases involving general principles of European Union (EU) law or cases with some relevance to this (apparent) category of EU law have attracted particular attention because they raise thorny ontological and methodological questions with respect to the general principles of EU law. It has been argued that it is due to “the nature of general principles of law, which are to be sought rather in the Platonic heaven of law than in the law books, that both their existence and their substantive content are marked by uncertainty.”² Furthermore, “(t)o a certain extent...as is generally the case with general principles of law as a legal source, until there is settled case-law on the matter, discussing the concrete content of such a principle can be very much like discussing the shape of a ghost.”³

It does not come as a surprise that the relatively young EU legal order is not (yet) equipped with a thorough and comprehensive legal methodology as is reflected in the vast majority of the classifications known, such as those from civil legal orders.⁴ The origin of the absence of a legal method for the law itself is to be found in a further methodological gap, namely the absence of a universally accepted account of how to conceptualize EU law and its normativity. The complex multi-level character of EU law, the linguistic and conceptual diversity governing the underlying national legal orders, the dynamic nature of the law, and the significant yet still irritating role of the judiciary have so far prevented the emergence of a comprehensively theorized jurisprudential account of the EU legal order.⁵ Although the interplay between the national and the EU level as well

¹ The paper is part of a larger research project on legal principles supported by the Swiss National Science Foundation. I wish to thank Prof. Samantha Besson for helpful comments on selected aspects of the paper, William Bull for language revision and the editors and reviewers of the *Pittsburgh Papers on the European Union* for useful comments. All errors remain my own.

² AG Mazák, Case C-411/05, *Félix Palacios de la Villa v Cortefiel Servicios SA*, 2007 E.C.R. I-08531, paras 86.

³ AG Mazák, Case C-47/07, *Masdar (UK) Ltd v. Commission of the European Communities*, 2008 E.C.R. I-09761, para 45.

⁴ The term “legal order” does not imply any view on the completeness of the law or the systemic character of the law taken as a whole.

⁵ For existing works that address questions concerning the nature of EU law, see, e.g., Frank Ernest Dowrick, “A Model of the European Communities’ Legal System,” *Yearbook of European Law* 3 (1983): 169-237 [[CrossRef](#)]; Mark L Jones, “Legal Nature of the European Community: A Jurisprudential Analysis using H.L.A. Hart’s Model of Law and a Legal System,” *Cornell International Law Journal* 17, no. 1 (1984): 4; W.D. Grussmann, “Grundnorm und Supranationalität,” in *Auf dem Wege zu einer Europäischen Staatlichkeit*, ed. v. Danwitz, et al. (Boorberg, 1993), 47; Ines Weyland, “The Application of Kelsen’s Theory of the Legal System to European Community Law: The Supremacy Puzzle Resolved,” *Law and Philosophy* 21, no. 1 (2002): 1-37; Joxerramon Bengoetxea, *The Legal Reasoning in the European Court of Justice: A Contribution to Legal Theory and European Community Law* (Oxford: Hart Publishing, 1993); Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999); Joxerramon Bengoetxea, Neil MacCormick, and Leonor Moral Soriano, “Integration and Integrity in the Legal

as the question of the ultimate legal authority have become the objects of lively and profound debates on a more or less abstract level, the question of the sources of EU law has remained largely unexplored. It is not only often unclear what constitutes a source of EU law and what distinguishes law from other social norms,⁶ but also how the different sources of EU law operate, how they are related to one another, and what their function is in judicial reasoning. The need for an overarching theoretical framework has become more pressing as the incomplete economic integration paradigm has been increasingly complemented by non-market policies and EU citizenship.

Historically, important controversies have affected several national legal systems; examples include the battles between “legal positivism” and “natural law,” between conceptual jurisprudence (*Begriffsjurisprudenz*) and an interest-based jurisprudence (*Interessenjurisprudenz*) and the Free Law School (*Freirechtsschule*) or between the French School of Exegesis (*l'École de l'Exégèse*) and Gény's free scientific research (*la libre recherche scientifique*).⁷ The absence of

Reasoning of the European Court of Justice,” in *The European Court of Justice*, eds. Gráinne de Búrca and J.H.H. Weiler (Oxford: Oxford University Press, 2001); Neil Walker, “Legal Theory and the European Union: A 25th Anniversary Essay,” *Oxford Journal of Legal Studies* 25, no. 4 (2005): 581-601 [CrossRef]; Samantha Besson, “From European Integration to European Integrity: Should European Law Speak with Just One Voice?,” *European Law Journal* 10, no. 3 (2004): 257-281 [CrossRef]; Neil Walker, ed. *Sovereignty in Transition* (Oxford: Hart, 2006); Mattias Kumm, “The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and After the Constitutional Treaty,” *European Law Journal* (2005): 262-307 [CrossRef]; Stefano Bertea, “Looking for Coherence within the European Community,” *European Law Journal* 11(2005): 154-172 [CrossRef]; Jan Komárek and Matej Avbelj, “Four Visions of Constitutional Pluralism – Symposium Transcript,” *European Journal of Legal Studies* 2, no. 1 (2008): 325-370; René Barents, “The Precedence of EU Law from the Perspective of Constitutional Pluralism,” *European Constitutional Law Review* 5 (2009): 421-446 [CrossRef]; Julie Dickson, “Directives in EU Legal Systems: Whose Norms Are They Anyway?,” *European Law Journal* 17, no. 2 (2011): 190-212 [CrossRef]; Gráinne de Búrca and J. H. H. Weiler, eds., *The Worlds of European Constitutionalism* (Cambridge: Cambridge University Press, 2011) [CrossRef]; Marco Goldoni, “Constitutional Pluralism and the Question of the European Common Good,” *European Law Journal* 18, no. 3 (2012): 385-406 [CrossRef]; Giulio Itzcovich, “Legal Order, Legal Pluralism, Fundamental Principles. Europe and Its Law in Three Concepts,” *European Law Journal* 18, no. 3 (2012): 358-384 [CrossRef]; Pavlos Eleftheriadis, “The Moral Distinctiveness of the European Union,” *International Journal of Constitutional Law* 9, no. 3-4 (2012): 695-713 [CrossRef]; Pavlos Eleftheriadis, Kalypso Nicolaidis, and J. H. H. Weiler, “Foreword: The Changing Landscape of European Constitutionalism,” *International Journal of Constitutional Law* 9, no. 3-4 (2012): 673-677 [CrossRef]; Matej Avbelj and Jan Komarek, eds., *Constitutional Pluralism in the European Union and Beyond* (Oxford: Hart Publishing, 2012); cf. also the project “Towards a European Legal Method: Synthesis or Fragmentation,” based at the University of Copenhagen/Copenhagen Business School, available at <http://www.cbs.dk/en/Research>. [VIEW ITEM]

⁶ For an account in English, see, e.g., Bengoetxea, *Legal Reasoning in the European Court of Justice*, Chapter 2; Bruno De Witte, “Legal Instruments and Law-making in the Lisbon Treaty,” in *The Lisbon Treaty*, eds. Stefan Grillner and Jacques Ziller (Vienna: Springer, 2008), 79-108.

⁷ For some examples concerning the post-national level, e.g. Armin von Bogdandy, “The Past and Promise of Doctrinal Constructivism: A Strategy for Responding to the Challenges Facing Constitutional Scholarship in Europe,” *International Journal of Constitutional Law* 7 (2009): 364-400 [CrossRef]; Mattias Kumm, “On the Past and Future of European Constitutional Scholarship,” *International Journal of Constitutional Law* 7 (2009): 401-415 [CrossRef]; Anthony Arnall, “The Americanisation of EU Law Scholarship,” in *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs*, eds. Anthony Arnall, Piet Eeckhout, and Takis Tridimas (Oxford: Oxford University Press, 2008), 414-431; Rob van Gestel and Hans W. Micklitz, “Revitalising Doctrinal Legal Research in Europe: What about Methodology?,” in *European Legal Method - Paradoxes and Revitalisation*, eds. Ruth Nielsen, Ulla B. Neergaard, Lynn M. Roseberry (Copenhagen: Djof 2011); Holger Fleischer, “Europäische Methodenlehre: Stand und Perspektiven,” *Rabels Zeitschrift für Ausländisches und Internationales Privatrecht* 75 (2011), 700-729.

similar debates in EU law has to do with the far-reaching reluctance of critically theorizing adjudication at the EU level.⁸ An open discussion of different currents of legal realism as opposed to the autonomy of the law also reflected in the opposition of form and substance has yet to take place at the EU level.

In the context of general principles of EU law,⁹ methodological questions have attracted attention only recently.¹⁰ Without attempting to solve thorny questions that lack national-level solutions,¹¹ the purpose of the present article is a modest one, namely to shed light upon some intriguing questions regarding the genesis, nature, and functions of general principles of EU law with a view to explaining the problems that underlie their recognition, interpretation, and application. It is not aimed at offering a ready-made solution for a universally applicable concept of general principles in EU law. Instead, the present paper draws upon debates involving principles in legal philosophy that have already led to partial clarifications of issues that currently spark debates in EU law and that may help in turn to clarify the situation in EU law. This approach situates the origin of the confusion at the jurisprudential and legal theoretical level. In this context, two narratives of principles will be presented as background materials that may serve as models for a legal positivist and an aprioristic notion of general principles applied in EU law. This article will assess the extent to which both prior and present cases in EU law involving general principles reflect certain elements of either model and what the implications are for questions concerning their source-quality, their legal basis, and their sources of inspiration. It will be argued that an evolution has taken place from a reliance upon natural law inspired reflections of general principles via the desperate search to ground general principles in various kinds of sources based on a more or less sound methodology towards an increasing reliance on strictly positivistic approaches that attach a clear preference to the traditional canon of sources of EU law. In this context, general principles are

⁸ For some of the few examples, e.g., Bengoetxea, *Legal Reasoning in the European Court of Justice*; Miguel Poiras Maduro, "Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism," *European Journal of Legal Studies* 1, no. 2 (2007); Kumm, "Jurisprudence of Constitutional Conflict;" Suvi Sankari, *Legal Reasoning in Context* (Groningen: Europa Publishing, 2013).

⁹ This term will be employed throughout the present article regardless of whether they are deduced, derived, or inferred from EU law, national law, or international law sources.

¹⁰ E.g., Bengoetxea, *Legal Reasoning in the European Court of Justice*; Matthias Herdegen, "The Origins and Development of the General Principles of Community Law," in *General Principles of European Community Law*, eds. Ulf Bernitz and Joakim Nergelius (The Hague, London: Kluwer, 2000), 3-23; Xavier Groussot, *General Principles of Community Law* (Groningen: Europa Law Publishing, 2006); Joxerramon Bengoetxea, "Review Essay on Xavier Groussot, General Principles of EC Law: The Wider European Law and Jurisprudence Debate," *Common Market Law Review* 45 (2006): 1279-1303; Matthias Herdegen, "General Principles of EU Law - The Methodological Challenge," in *General Principles of EC Law in a Process of Development*, eds. Ulf Bernitz, Joakim Nergelius, and Cecilia Cardner (The Hague: Kluwer, 2008), 2-23; the contributions by Samantha Besson, Joxerramon Bengoetxea, Johan Rochel, and Alain Zysset in eds. Samantha Besson and Pascal Pichonnaz, *Principles in European Law* (Zurich: Schulthess, 2011); AG Trstenjak, Case C-101/08, Audiolux SA v Groupe Bruxelles Lambert SA, 2009 E.C.R. I-09823; AG Mazák, Case C-47/07P, Masdar (UK) Ltd v Commission, 2008 E.C.R. I-9761; AG Trstenjak, Case C-282/10, Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre, nyr.

¹¹ See Vogenauer's remarks that at the EU level the ultimate authority, scope, and methodological questions related to their coming into being are as uncertain as in national legal orders in Stefan Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent: eine vergleichende Untersuchung der Rechtsprechung und ihrer historischen Grundlagen*, 2 vols. (Tübingen: Mohr Siebeck, 2001), 350.

likely to lose significance where other norms exist while retaining an important yet uncontrollable role where the traditional canon of sources is silent.

General principles of EU law: the ghost in the platonic heaven in need of conceptual clarification

Some terminological confusion: principles and their inherent or added generality

There is widespread agreement that there is no sound analytical framework ascertaining the genesis, existence, justification, and functions of general principles of EU law.¹² This absence of an analytical framework concerns questions of what is meant by a principle, by its generality, and what exactly denotes a general principle of EU law. From the outset, one may distinguish between the extent to which the legal principle is as such characterized by a certain inherent degree of generality and the extent to which the generality always constitutes a separate attribute. The answer to this question obviously depends on the adopted concept of principle and on the meaning attached to the term “generality.”

The notion of principle

A principle may be conceived of as a basic idea, something fundamental, a proposition of particular importance or weight that underlies a system at large.¹³ A principle is a norm (understood in a broad sense) that shows a certain degree of inherent structural generality in the sense of an indeterminate, abstract, programmatic, non-conclusive, or orientative character.¹⁴ Notwithstanding subsequent codification, principles are frequently unwritten and do not usually form a part of acts traceable to parliamentary authority according to the classic positivist understanding. Thus, they are

¹² Sigrid Jacoby, *Allgemeine Rechtsgrundsätze: Begriffsentwicklung und Funktion in der Europäischen Rechtsgeschichte* (Berlin: Duncker&Humblot, 1997), 18; Herdegen, *General Principles*, 24; Vogenauer, *Auslegung von Gesetzen*, 350; Bengoetxea, “Review Essay on Xavier Groussot,” 1279-1303, 1284; Axel Metzger, *Extra legem, intra ius: Allgemeine Rechtsgrundsätze im europäischen Privatrecht* (Tübingen: Mohr Siebeck, 2009), 5, 24; AG Trstenjak, Case C-101/08, *Audiolux SA v Groupe Bruxelles Lambert SA*, 2009 E.C.R. I-09823; AG Mazák, Case C-47/07P, *Masdar (UK) Ltd v Commission*, 2008 E.C.R. I-9761; AG Trstenjak, Case C-282/10, *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*, nyr.

¹³ On the feature of weight, importance, and other features of principles, see, e.g., Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977, reprinted 2009), 26; Robert Alexy, “On the structure of principles,” *Ratio Juris* 13 (2000): 294-304 [CrossRef]; Joseph Raz, “Legal Principles and the Limits of Law,” *The Yale Law Journal* 81, no. 5 (1972): 832 [CrossRef]; Bengoetxea, *Legal Reasoning in the European Court of Justice*, 71; Robert Alexy, “Zum Begriff des Rechtsprinzips,” *Rechtstheorie Beiheft* 1 (1979): 59; Ola Wiklund and Joxerramon Bengoetxea, “General Constitutional Principles of Community Law,” in *General Principles of European Community Law*, eds. Bernitz and Nergelius, 122; Takis Tridimas, *General Principles of EU Law*, 2d ed. (Oxford: Oxford University Press, 2006), 1, with reference to the Oxford Shorter Dictionary; Armin von Bogdandy, “Grundprinzipien,” in *Europäisches Verfassungsrecht: Theoretische und dogmatische Grundzüge*, eds. Armin von Bogdandy and Jürgen Bast (Berlin, Heidelberg: Springer, 2009), 27 in the context of “founding principles;” Sylvie Caudal, ed., *Les Principes en Droit* (Paris: Economica, 2008).

¹⁴ This has been acknowledged with regard to many principles, see e.g., Dworkin, *Taking Rights Seriously*, 26; Wiklund and Bengoetxea, “General Constitutional Principles,” 122-123; Bogdandy, “Grundprinzipien,” 21; Neil MacCormick, *Legal Reasoning and Legal Theory*, ed. paperback (Oxford: Oxford University Press, 1994), 155; Hart, *The Concept of Law*, Postscript 260; Tridimas, *General Principles*, 1; Alexy, “On the Structure of Principles,” 295.

controversial sources of law. Principles generally incorporate values, morality, ideologies, and political choices.

Various conceptions of generality in the context of principles

Generality in the context of principles can mean at least three things. First, principles often lack a precise and well-defined content (inherent structural generality). Second, generality in this context can also mean that a principle's significance extends to a comprehensive, overarching scope and hence goes beyond a specific field of law (scope-related generality). Third, general principles may be inferred from a common denominator across various national legal orders (origin-related, bottom-up generality), usually by means of the comparative method.¹⁵

Various types of principles in the EU context: General or not so general principles

Although the category of "general principles" appears to denote a term of art for judicially driven instruments, manifold uncertainty remains with respect to the situation in EU law. The Treaties use the term "principle" in the different language versions in an inconsistent manner.¹⁶ Moreover, there is no consensus on what the term "principle" means in EU law.¹⁷ Irrespective of

¹⁵ On the comparative method in EU constitutional law and in particular the meaning of commonalities and difference, Monica Claes and Maartje de Visser, "Reflections on comparative method in European constitutional law," in Maurice Adams and Jacco Bomhoff, *Reflections on the Comparative Method in European Constitutional Law: An Approach from the Inside Out* (Cambridge: Cambridge University Press, 2012), 143-169.

¹⁶ For further references, see Bogdandy, "Grundprinzipien," 25ff.

¹⁷ The Treaties in their current version mention the "principle of sincere cooperation" in Article 4 (3) of the Treaty on European Union (TEU), the "principle of conferral" and "principles of subsidiarity and proportionality" in Article 5 (1) TEU which all amount to fundamental statements of constitutional significance for EU law. Interestingly, they exhibit a considerable degree of indeterminacy, hence requiring specification through interpretation, and are, at the same time, deemed to govern not only selected areas of EU law, but rather underlie the legal system at large, in other words combining the first two conceptions of generality described above as inherent elements. Those three principles relate to the institutional and federal structure of the EU itself. Article 67 (4) of the Treaty on the Functioning of the European Union (TFEU) that stipulates the "principle of mutual recognition of judicial and extrajudicial decisions in civil matters" falls into a similar category of principle that applies in the respective area. Moreover, Title II of the TEU announces "provisions on democratic principles", which equally points to basic albeit open-textured concepts that cannot be applied outright and require concretization. As a general rule, all those sorts of principles may be inspired by concepts of federalism and composite jurisdictions known in the national laws of the Member States, so that their respective principles are to a certain extent "general" within the third sense.

Article 119 (1) TFEU refers to the "principle of an open market economy with free competition". Irrespective of the need to read this provision in conjunction with other fundamental Treaty provisions and precisely to clarify whether its scope is overarching throughout EU law at large in light of ideological controversies on the role of the market and intervention, this provision is intended to determine the economic orientation of a constitutional order that - being merely a framework norm - requires concretization in order to be applicable. In some situations, the Court refers to "principles" without having regard to a specific legal basis, such as the judicially driven "principle of state liability" that bears importance for the federal structure as well as for the efficacious enforcement of EU law and "rights" conferred to individuals according to the *Van Gend en Loos* parlance, see CJEU, Joined cases C-6/90 and C-9/90, *Francovich and Others v Italy*, 1991 E.C.R. I-5357, para 35; CJEU, Joined cases C-46/93 and C-48/93, *Brasserie du Pecheur SA v Germany and Factortame III*, 1996 E.C.R., I-1029, para 31; CJEU, Case C-224/01, *Gerhard Köbler v. Austria*, 2003 E.C.R. I-10239, paras 30 et seq. The Court therewith set up an inherently far-reaching yet unspecified instrument that it specified in subsequent cases. Another principle that the CJEU recognized is the principle prohibiting abusive practices, particularly important in tax law, company law, and the free movement of persons, see further CJEU, Case C-303/08, *Baden-Württemberg v Bozkurt*, nyr; CJEU, Case C-103/09, *HMRC*

that, there is widespread agreement that there is no sound analytical framework for general principles of EU law.¹⁸ The following overview is intended to sketch the state of affairs with respect to the terminology employed in the Treaties, the case law, and selected pieces of secondary legislation. The objective at this stage of the paper is neither to provide for a complete chronological overview nor to address details with respect to the nature of general principles.

(i) *General Principles*

Contrary to Article 38 ICJ-Statute,¹⁹ which has been widely recognized as a catalogue of sources of international law at large, there is no list of sources included in the Treaties at the EU level except for the enumeration laid down in Article 288 TFEU, which does not mention general principles. No generic provision on the category of principles or even general principles within the sense of a legal basis for their recognition or their mention as a source of EU law exists, let alone an authoritative definition of their concept. Articles 6 (3) of the Treaty on the European Union (TEU) and 340 (2) TFEU (and its reflection in Article 41 (3) of the EU Charter of Fundamental Rights (“the Charter”) in the context of “good administration”) are the only codified references to the general principles of EU law and the general principles common to the laws of the Member States in the Treaties.

The current Article 6 (3) TEU was first included in the Treaty of Maastricht and to a large extent codifies case law by which the Court originally introduced the category of the “general principles of law”²⁰ or the “general principles of Community law”²¹ into EU law in relation to fundamental rights, without, however, grounding its activity upon a specific legal basis. Instead, the Court programmatically suggested in some early cases that certain general principles of EC/EU law were inherently part of the EC/EU legal order.²² Today, Article 6 (3) TEU mentions the “general principles of the Union’s law” as one of the categories of EU fundamental rights whose role in relation to the provisions laid down in the EU Charter of Fundamental Rights remains unclear. The current challenges consist of organizing the interplay between the unwritten general principles and overlapping Charter provisions with respect to the personal, material, and temporal scope of a given right or legally protected interest. Where fundamental rights are not incorporated in other norms, general principles remain default instruments.²³ The fundamental character of general principles,

v Weald Leasing, nyr, and Case C- 277/09, HMRC v RBS Deutschland, nyr; Rita De la Feria and Stefan Vogenauer, eds., *Prohibition of Abuse of Law: A New General Principle of EU Law?* (Oxford: Hart, 2011).

¹⁸ Jacoby, *Rechtsgrundsätze*, 18; Herdegen, *General Principles*, 24; Vogenauer, *Auslegung von Gesetzen*, 350; Bengoetxea, “Review on Groussot,” 1284; Metzger, *Rechtsgrundsätze*, 5, 24; AG Trstenjak, Case C-101/08, Audioux SA v Groupe Bruxelles Lambert SA, 2009 E.C.R. I-09823; AG Mazák, Case C-47/07P, Masdar (UK) Ltd v Commission, 2008 E.C.R. I-9761; AG Trstenjak, Case C-282/10, Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre, nyr.

¹⁹ Article 38 (1) lit.c ICJ-Statute entails “the general principles of the law recognized by civilized nations” that have been introduced after heated debates, which remain of limited significance in practice.

²⁰ CJEU, Case C-4/73, Nold, 1974 E.C.R. 491, para 13.

²¹ CJEU, Case C-29/69, Stauder, 1969 E.C.R. 419, para 7.

²² CJEU, Case C-29/69, Stauder, 1969 E.C.R. 419, para 7; Case C- 4/73, Nold, 1974 E.C.R., 419, para 13.

²³ See further with respect to the equal treatment principle, Constanze Semmelmann, “General Principles in EU Law Between a Compensatory Role and an Intrinsic Value,” *European Law Journal* (2013 forthcoming).

which justifies the denomination “principle,” may result from their high moral value in liberal democracies. They often seem to meet all three dimensions of generality mentioned previously; the indeterminacy and open-texture that denote the generality of the first type underpins many written and unwritten human rights. General principles also usually apply across various fields of law (i.e., they are general with respect to their scope of application). Furthermore, reliance on common elements in the laws of the Member States as the origin of the principles justifies the assumption of their generality in the third sense.

Terming unwritten fundamental rights “general principles” while at the same time providing for a written and now binding bill of rights that explicitly distinguishes between “rights,” “freedoms,” and “principles” (as indicated also in Article 6 (1) TEU) obviously does not foster clarity.²⁴ The distinction between rights and principles in the Charter suggests (without, however, determining which provisions incorporate rights and which ones are to be classified as principles) that “principles” within the meaning of the Charter have an even more indeterminate definition than regular “general principles” within the meaning of Article 6 (3) TEU and, as a consequence, cannot provide a basis for positive and enforceable claims. In other words, their justiciability is called into question. The underlying rationale of this distinction between rights and principles relates to the separation of powers, budget-related concerns, and ideological differences as to the reach and strength of social rights.

To date, the Court has recognized various general principles such as rights of defense in administrative proceedings in competition or anti-dumping law,²⁵ the general principle of human dignity,²⁶ or the right to effective judicial protection.²⁷ One of the most developed general principles is the equal treatment principle. The Court has mentioned the “general principle of equality which is one of the fundamental principles of Community law,”²⁸ which it later termed the “general principle of equality and non-discrimination”²⁹ or “the general principle of equal treatment”³⁰ and

²⁴ On the distinction between rights and principles referred to in Article 52 (2) of the EU Charter of Fundamental Rights, see, e.g., Chris Hilson, “Rights and Principles in EU Law: A Distinction Without Foundation?,” *Maastricht Journal of European and Comparative Law* 15, no. 2 (2008): 193; Paul Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (Oxford: Oxford University Press, 2011), 216-217; Johannes Schmidt, *Die Grundsätze im Sinne der EU-Grundrechtecharta* (Tübingen: Mohr Siebeck, 2010).

²⁵ E.g., CJEU, Case C-155/79, *AM & S Europe Limited v Commission of the European Communities*, 1982 E.C.R. 1575 (on the legal professional privilege providing protection for communications between external lawyers and their clients, recognized on the basis of the comparative method); CJEU, Case C-550/07 P, *Akzo Nobel and Others v Commission*, nyr (on the confidentiality of communications between in-house lawyers and client); CJEU, Joined cases C-46/87 and C-227/88, *Hoechst AG v. Commission*, 1989 E.C.R. 2859 (with regard to the fundamental right to the inviolability of the business premises (rejected)); CJEU, Case C-94/00, *Roquette Frères v Council*, 2002 E.C.R. I-9011 (with regard to the fundamental right to the inviolability of the business premises (accepted)).

²⁶ CJEU, Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v OB der Stadt Bonn*, 2004 E.C.R. I-9609.

²⁷ CJEU, Case C-222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster*, 1989 E.C.R. 1651; CJEU, Case C-279/09, *Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, nyr.

²⁸ CJEU, Joined cases C-117/76 and C-16/77, *Ruckdeschel*, 1977 E.C.R. 1753, para 7.

²⁹ CJEU, Case C-442/00, *Rodríguez Caballero*, 2002 E.C.R. I-1915, para 32.

³⁰ CJEU, Case C-144/04, *Werner Mangold v Rüdiger Helm*, 2005 E.C.R. I-9981, para 76.

which was recently declared a “general principle of European Union law”³¹ according to the terminology of the Lisbon Treaty. Whereas the prohibition of discrimination on grounds of sex has long been recognized as a general principle and classed as a fundamental right as regards equal pay in the employment context,³² other specific equality principles such as the prohibition of discrimination on grounds of age have been qualified as fundamental rights only recently; this matter will be explored in more detail below. In addition, the EU Charter of Fundamental Rights affirms the constitutional status of several expressions of the equal treatment principle.³³ Interestingly, secondary legislation that expressly aims to “implement” the equal treatment principle omits references to its generality that the Court has unambiguously recognized.³⁴ Unless this reflects a legislative contingency, this move can be justified by arguing that secondary legislation indeed only covers a more limited scope. The overarching scope of the equal treatment principle as a precondition for the recognition of its generality of the second type as opposed to specific norms of limited scope was tested (and ultimately denied) in a recent company law case: in *Audiolux*, the Court refused to recognize a general principle of equal treatment of shareholders vis-à-vis their company as invoked by the parties to the national dispute.³⁵ This aspect has provoked heated debates with regard to the equality principle and its significance in horizontal relationships of various kinds and has shown that a careful definition of the generality of a given principle does matter.

General principles have also emerged in areas that are sometimes less obviously related to individual rights, although they do provide for typical instruments of private parties against public power in those areas. Well-established case law includes the “principle of proportionality which is

³¹ CJEU, Case C-555/07, *Küçükdeveci v Swedex GmbH*, nyr, para 21.

³² CJEU, Case C-43/75, (*Defrenne v Sabena*) *Defrenne II*, 1976 E.R.1976 455; CJEU, Case C-149/77, (*Defrenne v Sabena*) *Defrenne III*, 1978 E.C.R. 1365, paras 26-29.

³³ Cf. the general equal treatment postulate (Art 20), a prohibition of non-discrimination on grounds of nationality (Art 21 (2)) and various other grounds (Art 21 (1)) as well as a provision on gender equality (Art 23) in addition to other more subject-matter-specific provisions. With regard to the role of the equal treatment principle and its different conception under the ECHR, Samantha Besson, “Gender Discrimination under EU and ECHR Law,” *Human Rights Law Review* 8, no. 4 (2008):323. [[CrossRef](#)]

³⁴ One may mention the “Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation,” “Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin,” the “Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services,” and “Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.” The same applies to the early generation of anti-discrimination legislation, cf., e.g., “Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working condition” (now recast).

³⁵ CJEU, Case C-101/08, *Audiolux SA ea v Groupe Bruxelles Lambert SA*, 2009 E.C.R. I-9823. See also Axel Metzger, “Allgemeine Rechtsgrundsätze in Europa - dargestellt am Beispiel des Gleichbehandlungsgrundsatzes,” *Rabels Zeitschrift für Ausländisches und Internationales Privatrecht* 75 (2011): 845-881. In a tax case, the Court ruled that “the principle of fiscal neutrality, and, in particular, the right to deduct, as an integral part of the VAT scheme, is a fundamental principle underlying the common system of VAT established by the relevant Community legislation,” see CJEU, Case C-174/08, *Nordic Construction Comp. Baumanagement GmbH*, 2009 E.C.R. I-10567, para 40.

one of the general principles of EU law”³⁶ (which was applied in the early days in particular in the area of market-regulation and staff cases and has since broadened in scope; Article 5 (1) TEU introduced into the Maastricht Treaty mentions merely one expression relating to legislative competence). Likewise and in particular in the area of market-regulation, the CJEU stated that a given practice “must still comply with the general principles of European Union law which include the principle of legal certainty,”³⁷ which is at times not distinguished from the protection of legitimate expectations.³⁸ Both principles are diffuse yet fundamental from the perspective of the rule of law and refer primarily to relationships between private parties and public power.³⁹

A provision of particular interest when it comes to the notion of principle and its generality in EU law is Article 340 (2) TFEU, which refers to the non-contractual liability of the EU that has been part of the Treaties ever since their adoption. The existence of this liability as such is stipulated by the TFEU, the conditions of which are governed by the “general principles common to the laws of the Member States” in this regard. Here, the TFEU displays a fundamental constitutional choice in favor of a duty of the EU to provide compensation for damages the conceptual indeterminacy of which requires the conditions of this common law on liability to be specified on the basis of the comparative method. In this context, the attribute of the generality denotes commonalities across national legal orders that inspire the details of the liability. This provision has inspired the evolution of state liability addressed to Member States⁴⁰ and the liability of the EU in the absence of fault.⁴¹

(ii) *Sector-specific principles instead of general principles*

More recently, principles gained attention also in what is traditionally referred to as “private law.” Although the label of “public” as opposed to “private” law does not share the same significance in EU law that it enjoys in many national legal systems, the CJEU appears to deliberately avoid the term “general principles” in the context of private law (understood in a broad sense, including, for instance, labor relations) and instead favors different attributes that exhibit a certain hesitant attitude. To begin with, the notion of principle is reflected in the various drafts on the harmonization of private law in the EU without, however, employing the term “principle” in a consistent manner irrespective of the complete absence of the term “general principles of EU law.”⁴²

³⁶ E.g., CJEU, Case C-309/10, nyr, *Agrana Zucker GmbH v Bundesminister für Land- und Forstwirtschaft*, para 42; CJEU, Case C-15/10, *Etimine and Etiproduits v ECHA*, nyr, para 124.

³⁷ CJEU, Joined cases C- 201/10 and C- 202/10 *Ze Fu Fleischhandel GmbH and Vion Trading GmbH*, nyr.

³⁸ *Tridimas, General Principles*, 242 with further references.

³⁹ *Ibid.*, 4.

⁴⁰ CJEU, Joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA and Factortame III*, 1996 E.C.R. I-1029, para, 28: “Indeed, it is to the general principles common to the laws of the Member States that the second paragraph of Article 215 of the Treaty [340 TFEU] refers as the basis of the non-contractual liability of the Community for damage caused by its institutions or by its servants in the performance of their duties.”

⁴¹ E.g., CJEU, Case C-352/98, *P Bergaderm and Goupil v Commission*, 2000 E.C.R. I-5291, para 39: “The second paragraph of Article 215 of the Treaty [340 TFEU] provides that, in the case of non-contractual liability, the Community is, in accordance with the general principles common to the laws of the Member States, to make good any damage caused by its institutions or by its servants in the performance of their duties.”

⁴² Several categories of principles can be distinguished in classic areas of private law: 1) the Principles of European Contract Law (PECL), 2) the section on “Principles” in the Draft Common Frame of Reference (DCFR), 3) the “Acquis Principles” which are supposed to reflect a restatement of the existing EU contract law and which demonstrate an attempt to formulate

The drafts contain both very specific principles and more abstract ones. Like those proposals, the case law has shown great reluctance to extend the category of general principles to classic fields of contract and thus private law. In some recent cases, the narrower sector-specific classification of certain principles as “(general) principles of civil law” was adopted and apparently preferred to “general principles” of a broader scope.⁴³ A similar sector-specific approach was given preference by the Court in the context of labor relations when the Court stated that “the entitlement of every worker to paid annual leave must be regarded as a particularly important principle of European Union social law.”⁴⁴ As mentioned previously, the CJEU expressly rejected the recognition of new general principles of EU law that would have extended the equal treatment principle to a horizontal setting in company law where specific legislation existed.⁴⁵ This case law has shown the CJEU’s great reluctance to extend the category of general principles of EU law to fields of private law. Yet, it suggests that the attribute of generality is gaining contours within the meaning of scope-related generality, which is characterized by fairly high hurdles and still struggling to overcome the public-private distinction.

a general contract law on the basis of the EU consumer law acquis and finally 4) the “Principes directeurs du droit européen du contrat” which were developed by French academics as a supplement to the revised version of the PECL. The DCFR contains “principles, definitions and model rules.” According to the introduction, principles and model rules “appear to overlap and require some explanation.” In the absence of a definition of principles in the 2001 Commission Communication initiating the CFR, the 2009 DCFR states that the term “principles” sometimes refers to rules that do not have the force of law and concedes at the same time that “alternatively, the word ‘principles’ might be reserved for those rules which are of a more general nature, such as those on freedom of contract or good faith.” The 2009 DCFR also refers to a third form of “principle” in the expression “fundamental principles,” that denote “essentially abstract basic values.”

On principles in private law see, e.g., Jan M. Smits, “The Principles of European Contract Law and the Harmonization of Private Law in Europe,” in *La tercera parte de los principios de derecho contractual europeo*, ed. Vacquer Antoni (Valencia: 2005), 153; Metzger, *Rechtsgrundsätze*, 233; Martijn Hesselink “‘If You Don’t Like Our Principles We Have Others’: on Core Values and Underlying Principles in European Private Law: A Critical Discussion of the New ‘Principles’ Section in the Draft CFR,” *CSECL Working Paper* No. 10, 2009; Simon Whittaker, “A Framework of Principle for European Contract Law?,” *Law Quarterly Review* 125 (2009):616; Jansen Nils and Zimmermann Reinhard, “A Critical Examination of the ‘Principles of the Existing EC Contract Law’,” *Modern Law Review*, (2009): 505-534; Kai Purnhagen, “Principles of European Private Law – A case for the ECJ? A Plea for a Symbiotic Relationship Between the ECJ and the CFR in a Pluralistic European Private Law,” *SSRN eLibrary and European Law Journal* 18 no.6 (2012): 844-867; Stephen Weatherill, “Case Note: The ‘Principles of Civil Law’ as a Basis for Interpreting the Legislative Acquis,” *European Review of Contract Law*, no. 1 (2010): 75-85; Vanessa Mak, “A Shift in Focus: Systematisation in European Private Law through EU Law,” *European Law Journal* 17, no. 3 (2011): 403-428 [[CrossRef](#)]; Martijn W. Hesselink, “The General Principles of Civil Law: Their Nature, Roles and Legitimacy,” in *The Involvement of EU Law in Private Law Relationships*, eds. Dorota Leczykiewicz & Stephen Weatherill (Oxford: Hart, 2012), 131-180.

⁴³ In *Hamilton*, the CJEU mentioned as “one of the general principles of civil law” the principle “that full performance of a contract results, as a general rule, from discharge of the mutual obligations under the contract or from the termination of that contract,” CJEU, Case C-412/06, *Annelore Hamilton v Volksbank Filder eG*, 2008 E.C.R. I-02383, para 42; in *Messner*, the CJEU invoked “the principles of civil law, such as those of good faith or unjust enrichment”, CJEU, Case C-489/07, *Pia Messner v Firma Stefan Krüger*, 2009 E.C.R. I-07315, para 26. The case C-101/08, *Audiolux SA ea v Groupe Bruxelles Lambert SA*, 2009 E.C.R., I-9823 dealt with the existence of a general principle of equal treatment of minority shareholders in company law.

⁴⁴ CJEU, Case C-173/99, *BECTU*, 2001 E.C.R. I-4881, para 43; CJEU, Case C-282/10, *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*, nyr, para 16.

⁴⁵ CJEU, Case C-101/08, *Audiolux SA ea v Groupe Bruxelles Lambert SA*, 2009 E.C.R., I-9823.

Conclusion

To summarize, various sorts of principles have emerged in EU law the significance of which in most instances extends beyond specific situations and to which fundamental significance for the EU legal system at large has been attached in one way or another.

As to the subject matter of these principles, it appears beyond doubt that the term “principle” in EU law is not confined to a particular category of substantive issues. Some accounts of principles in legal philosophy involve a particular and more limited notion of principle (such as the Dworkinian principles confined to the protection of individual rights and opposed to the collective public interest that Dworkin dubs “policies”) whereas others conceived of principles in a broader sense with regard to their subject matter.⁴⁶ This requires particular caution with regard to a Dworkinian reading of principles in EU law given that Europe does not have the natural law tradition that underlies U.S. constitutional law and hence Dworkin’s theory. In order to avoid terminological confusion, the term “principle” as it is employed here is not confined to the Dworkinian principles that denote individual rights as opposed to the collective public interest.

Beyond the situations in which generality is viewed as an inherent feature of principles, these principles may be attached the attribute referring to their general character. Their generality seems to require in the first place that they apply to the legal system as such and not only to specific sectors, although their origin in a common denominator across national laws also plays a significant role. With respect to their origin, some principles are genuinely connected to the EU such as the equal treatment principle whereas others have their origin in the national laws of the Member States and can be derived from more or less complete or selective comparative analyses in the light of the conception of the EU as a composite legal system.⁴⁷

It is remarkable that the Court is willing to use the term “general principles” beyond the few codified situations in the context of principles epitomizing the rule of law such as proportionality and legitimate expectations. The reason may be that those categories of principles seem to cause less resistance from a constitutional perspective because as a horizontal matter they do not bluntly conflict with the allocation of powers.

⁴⁶ Dworkin distinguishes between rules (which apply in an all-or-nothing fashion), principles (as opposed to rules, defined as “a standard that is to be observed not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality”), “policies” (“a kind of standard that sets out a goal to be reached, generally an improvement in some economic, political or social feature of the community...”) and “other sorts of standards”, cf. Dworkin, *Taking Rights Seriously*, 22-28. Broader notions of principles have been put forward by Alexy, “On the Structure of Principles”; MacCormick, *Legal Reasoning*, Chapter 7; Kumm, “Jurisprudence of Constitutional Conflict”; Poiares Maduro, “Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism”; Itzcovich, “Legal Order, Legal Pluralism, Fundamental Principles. Europe and Its Law in Three Concepts.”

⁴⁷ On this notion Leonard Besselink, *A Composite European Constitution* (Groningen: Europa Law Publishing, 2007); see also Ingolf Pernice and Franz C. Mayer, “De la constitution composée de l’Europe,” *Revue trimestrielle de droit européen*, 36 (2000): 623-647; Ingolf Pernice, “Multilevel constitutionalism in the European Union,” *European Law Review* 27 (2002): 511-529.

The Court prefers a different terminology or avoids the classification of “general principles” where the EU obviously lacks legislative competence and where ideological battles still require debates and settlement at the political level, as is the case in contract law and labor relations.

The vast majority of authors and Advocates General (AG) at the CJEU concede that the term “(general) principles” encompasses a variety of meanings that makes it difficult to elaborate a universally applicable concept that allows for context-independent classifications.⁴⁸ Nonetheless, it is submitted here that, as a starting point, principles are judge-made norms that often do not lead to immediate well-defined legal consequences.⁴⁹ Whether “general principles” now amounts to a term of art in EU law requires very careful consideration in the future in every individual case because this category of norms is being invoked increasingly as a powerful tool that can potentially prevail over other sources of law. The need for general principles decreases the more dense the body of written law in the EU legal system becomes.

Background information: two narratives of principles in legal philosophy and legal theory

On the need to bridge EU law and legal philosophy/legal theory

The former section did merely intend to exhibit—and not yet to explain—the terminological confusion with respect to a legal principle in EU law and its generality. In the present section however, it will be highlighted and finally also explained why the identified terminological confusion goes hand in hand with conceptual difficulties, borderline problems, overlaps, and inconsistencies as to the genesis, interpretation, and application of different sorts of principles. It seeks to illustrate that a vast part of the current confusion surrounding the term “principle” stems from the persisting absence of attempts to bridge jurisprudential accounts of principles with EU law. It is not aimed at offering a ready-made solution for a universally applicable concept of principle in EU law. Instead, the present section attempts to trace the current uncertainty and controversies in EU law to debates involving principles in legal philosophy that have to a large extent been engaged in previously. Particular attention will be dedicated to the genesis of legal principles, their functions, and the relationship between legal and extra-legal discourses. Motivated by the belief that general principles have and in many areas will retain an intrinsic value despite the increasing references to the EU Charter of Fundamental Rights or the adoption of more specific and straight-forward secondary legislation (in particular in equality law, for instance),⁵⁰ the following section will sketch

⁴⁸ Tridimas, *General Principles*, 1-6; Bengoetxea, *Legal Reasoning in the European Court of Justice*, 76-79; Herdegen, *General Principles*; John A. Usher, *General Principles of EC Law* (London: Longman, 1998); Henry G. Schermers, “Human Rights as General Principles of Law,” in *General Principles of European Community Law*, eds. Bernitz and Nergelius, 61-71; A.G. Toth, “Human Rights as General Principles of Law, in the Past and in the Future,” in *General Principles of European Community Law*, eds. Bernitz and Nergelius, 73-92; Groussot, *General Principles*, 129; Whittaker, “A Framework of Principle”; Anthony Arnall, “What is a General Principle of EU law?,” in *Prohibition of Abuse of Law. A New General Principle of EU Law?* eds. Rita de la Feria and Stefan Vogenauer (Oxford: Hart, 2011), 7-25; AG Trstenjak in Case C-101/08, *Audiolux SA e v Groupe Bruxelles Lambert SA*, 2008 E.C.R., I-09823, para 67.

⁴⁹ This does not exclude, however, that different sorts of principles may at times serve as self-standing instruments, as was the case in the *Defrenne II* case with regard to the principle of equal pay between men and women in employment matters, Case 43/75, (*Defrenne v Sabena*) *Defrenne II*, 1976 E.C.R., 455.

⁵⁰ On the allegedly decreasing influence of general principles in EU law, Semmelmann, “General Principles in EU Law Between a Compensatory Role and an Intrinsic Value.”

the opposition between a natural law-inspired model of principle and a model of principle influenced by legal positivism (understood in a broad sense, i.e., law as a matter of what has been posited (ordered, decided, practiced, tolerated)).⁵¹

The Hart-Dworkin debate as a starting point

As it will be demonstrated later, we can find traces in EU law of what I shall dub an “aprioristic” principle that may be inspired by natural law approaches on the one hand and a principle inspired by legal positivist currents on the other.⁵² This distinction does not flow from any novel theory.⁵³ During the second half of the 20th century, the category of principles has been the object of heated debates in legal philosophy and legal theory.⁵⁴ Principles have served as a welcomed tool in order to attack the theoretical framework of legal positivism, which had somewhat suggested the dissociation of the law from other social spheres such as morality or politics. Principles thus provided a means of overcoming the corset of legal positivism. The aim of these advancing legal principles was to provide a realistic account of adjudication instead of a legislation-focused and more static account of the law. Famously, Dworkin argued that principles (recall that he views them as individual rights as opposed to the collective public interest) underlie black-letter law and contribute to the enforcement of rights even in the absence of concrete rules (i.e., in situations not (entirely) covered by black-letter rules).⁵⁵ According to his theory, principles can only be identified by engaging in moral or political discussions about what principles should be invoked because they are considered appropriate and developed in the profession and the public over time and not by invoking Hart’s rule of recognition.⁵⁶ Hence, the legal validity of principles depends on their content as deemed appropriate and not on a particular decision of a legislature or court, although Dworkin admits that they are often reflected in the latter. To date, this debate has lost some of its ferocity and rigor. Nonetheless, the debate serves as a starting point for determining two models of principle in

⁵¹ See further Leslie Green, “Legal Positivism” in *The Stanford Encyclopedia of Philosophy* (Fall 2009 Edition), ed. by Edward N. Zalta, <http://plato.stanford.edu/archives/fall2009/entries/legal-positivism/>. [\[VIEW ITEM\]](#)

⁵² Until the 19th century, law was widely understood as in some way given or pre-determined. Some considered it as divinely inspired, others as dictated by human nature and discoverable through reason. Other non-instrumental ways for a principle to come into being conceive of principles as reflections of customary law that is not the product of anybody, but a collective emanation from below, see further Brian Z. Tamanaha, *Law as a Means to an End* (Cambridge: Cambridge University Press, 2006), 11ff. [\[CrossRef\]](#) In areas such as fundamental rights protection, natural law approaches may work, whereas in more technical areas of law, they might be misconceived. Especially in the area of private law, the interpretation of the emergence of principles as customs is very common.

⁵³ It would be inappropriate to argue in the context of different sorts of principles in EU law that the ontological problems relating to principles are not comparable to earlier discourses because notably the legal positivist concepts have developed from and for a nation-state setting. Even though EU law is characterized by a peculiar multi-level governance and law enforcement structure, it is submitted here that the body of EU norms is not prevented *per se* from representing law based on ultimate authority originating in social fact understood in a hierarchical or heterarchical manner.

⁵⁴ For other writings on (general) principles, e.g., Rudolf B. Schlesinger, “Research on the General Principles of Law Recognized by Civilized Nations,” *American Journal of International Law* 51 (1957): 734; Bengoetxea, “Review on Groussot;” Alexy, “On the structure of principles;” Josef Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts* (Tübingen: Mohr&Siebeck, 1956); Alexy, “Zum Begriff des Rechtsprinzips;” Jean Boulanger, “Principes généraux du droit,” in *Le droit privé français au milieu du XXe siècle. Etudes offertes à Georges Ripert* (1950), 230; Roscoe Pound, “Hierarchy of sources and forms in different systems of law,” *Tulane Law Review* 7, no. 4 (1933): 475-487.

⁵⁵ Dworkin, *Taking Rights Seriously*; Dworkin, *The Law’s Empire* (Cambridge: Harvard University Press, 1986).

⁵⁶ Dworkin, *Taking Rights Seriously*, 40.

the following section that were inspired by earlier debates but which do not necessarily entirely correspond to the views defended in those debates.

Two narratives of principle from a legal philosophy perspective

Two narratives of principle may serve as models that will at least partly be reflected in EU law. The starting point is the question of whether principles exist *a priori*, in other words, precede positive law temporally speaking (which may lead us into speculative spheres concerning their origin and justification) or whether they rather become valid law by (gradual) judicial or legislative recognition developed along the lines of positive law (to be on the “safer” side). Depending on which model is preferred, principles are found or discovered on the one hand or invented, recognized, or created on the other.

This basic distinction between pre-existing and *ex post facto*-created principles has an equal impact on the classification of materials influencing the content of the principles. In the first cases, they are merely illustrative bodies of evidence and confirmation for a pre-determined conclusion, whereas in the second, they are true sources of inspiration for the emerging principles.

In simple terms, different functions of principles can be distinguished from the outset. One may argue on the one hand that *a priori* principles are part of the law and underlie it; hence, they substantiate, justify, and legitimize the written law and even validate expansions of it. On the other hand, abstractions and generalizations are somewhat empirically inferred from more specific and notably positive sources of law. They systematize and structure existing as well as emerging legal materials.

(i) The aprioristic principle

In the first case, the principle is an aprioristic element preceding the more concrete positive norms found in a gapless legal system. It may be conceived of as immanent within the customs of the society. This means that the legal validity of principles neither depends on judicial recognition nor on any other connection with positive law. This may at times not exclude the possibility that the determination of the exact content of principles will require a judicial decision. Due to the non-conclusiveness of legal principles upon the outcome of a respective case, this does not necessarily imply that principles can be directly invoked. They are a part of the law because of their content, which works best in ethical fields of law and less well in technical areas such as administrative law. The role of the judge is to ascertain the principles that are reflected in black-letter law or those that the judge considers existent and relevant when there is no law applicable to the case at hand. Institutional criteria never serve as a yardstick for the determination of whether the principles are indeed part of the law. This view does not seem to raise the well-known problems of judicial law-making (including the problem of its retroactive effect) and judicial activism. The discovery of principles and interpretation as such is necessarily “constructive” in a Dworkinian sense, which means that interpretation requires the judge to draw upon certain sets of values. The question of gaps and discretion does not appear because the “evaluative” exercise is made with respect to the choice and interpretation of the relevant principles and their reflection in black-letter law.

(ii) The version of principle inspired by legal positivism

It is not that legal positivism provides for a tailor-made concept of principle, but rather its major features may be relied upon to construe a concept of principle that remains as mindful as possible of legal positivist beliefs. Legal positivist ideas in their crudest form reflect the attempt to

free the concept of law from morality as a pre-condition for its validity. Positivists do not deny that judges sometimes decide cases by reference to moral values. What they do deny is that judges necessarily have to make moral judgments in working out what the law is. According to narrow positivist theories, the binding and mandatory character of the act in question becomes part of the definition (i.e., the person framing the legal solution must be under a formal duty or feel obliged on the basis of a social rule to act in a particular way). Broader concepts include “may-sources” that do not imply a duty to apply certain norms, including, for example, arguments derived from the principle as permissive or persuasive arguments.⁵⁷ Positive law is considered an emanation of a formal constitutive act. The latter serves as a starting point and remains the crucial point of reference for the existence and application of a norm. Where principles do not *a priori* form part of the clearly identifiable sources of law and thus generally remain extra-legal phenomena, they may still be incorporated into the realm of the law by being connected to positive law. In the literature, the quest for a link between positive law and a legal principle is rather widespread.⁵⁸ There is disagreement, however, about how this link is to be shaped.

Legal principles can be inferred from several more specific norms within a given legal order or situated in “foreign” legal orders. More controversially, a principle can arguably also be deduced from the rationale of a single provision and the inherent *telos* or spirit of a statute.⁵⁹ The latter options show that it is not always easy to delineate and classify the elements from which the principles may be inferred or deduced and how their (in one way or another necessary) link to positive law is to be shaped. Narrow conceptions tend to require that the sources from which principles are inferred be legally binding. Broader concepts may include non-binding documents or the *telos* or spirit of a binding norm, which leads to a weaker link to positive law.

The most accepted linking methods include inductive techniques.⁶⁰ Inductive processes attributed to the realm of law are seen as requiring additional evaluative elements.⁶¹ These evaluative elements are reflected in the determination of when a given idea should be elevated to a principle that enjoys a more general, overarching scope. Evaluative elements thus relate to the determination of similarities among several specific norms or among several norms situated in several legal orders as a precondition for the generality with respect to a particular criterion. Within the latter process, the new legal product may either extend the material scope (when inferred from several similar norms within the same legal order) or the geographic scope (when inferred from several foreign or comparative sources).⁶² Hence, these two possible extensions make up the generality of a given norm as mentioned previously in opposition to its formerly more limited scope of application. This,

⁵⁷ MacCormick, *Legal Reasoning*, 163, 188.

⁵⁸ Esser, *Grundsatz und Norm*; Raz, “Legal Principles,” 823-854; H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Clarendon Press, 1994), Postscript; Herdegen, “General Principles (2008)”; Bogdandy, “Grundprinzipien”; Metzger, *Rechtsgrundsätze*.

⁵⁹ Claus-Wilhelm Canaris, *Systemdenken und Systembegriff in der Jurisprudenz - Entwickelt am Beispiel des deutschen Privatrechts*, 2nd ed. (Berlin: Duncker&Humblot, 1983), 69, 100; Metzger, *Rechtsgrundsätze*, 164-167.

⁶⁰ MacCormick, *Legal Reasoning*, 153; Canaris, *Systemdenken und Systembegriff in der Jurisprudenz*, 97; Metzger, *Rechtsgrundsätze*, 57.

⁶¹ Metzger, *Rechtsgrundsätze*, 52.

⁶² *Ibid.*, 97.

according to adherents of inductive theories, clearly demonstrates that the generality of a principle in the sense of its extended scope needs to be separated from its potentially indeterminate, non-conclusive character.

Value judgments

To date, this classical debate on the role of principles in adjudication has lost some of its ferocity and rigour. Both camps—those who espouse a natural law or customs inspired emphasis on aprioristic and pre-political principles and their legal positivist counterparts—concede that adjudication is not mechanical law application and that legal reasoning based on the *lex lata* and the classical catalogue of sources of law is not sufficient to resolve contemporary disputes in light of the plurality of values and complex choices to be made.⁶³ This requires us to unveil the process through which extra-legal phenomena are incorporated into the law (i.e., their transformation into legal instruments),⁶⁴ which, at the same time, reflects the communication between legal and extra-legal aspects in this process.

For those who believe judges simply discover pre-existing principles by engaging in interpretative activities that are *a priori* part of the law, the question of value judgments does not come up openly because value judgments remain hidden either behind legalistic deductive reasoning or behind the references to pre-existing universalism with respect to values and ideals. Any attempt to render this approach more transparent would undermine its very foundation, namely the aprioristic character of a principle whose ultimate premise is immune to the need of justification. This approach enables judges to a certain extent to evade their responsibilities to justify their choices or even to conceal *contra legem* decisions.

For legal positivists on the other side of the spectrum, the existence of discretion is a basis of judicial law-making, and the evaluative elements are situated here. Whereas this conclusion was often avoided by the early legal positivists, it was conceded by their successors towards the end of the 20th century. Modern positivists have argued that the gaps in the law are to be filled on the basis of the law-creating discretion conferred on the courts through a “genuine though interstitial law-making power,”⁶⁵ which is deemed to be no more of a threat to democracy than the delegation of limited legislative powers to the executive in modern democracies. Principles confer power to the judges to develop and even extend the law to cover circumstances that are not, or at least not unambiguously, covered by mandatory rules.

Back to EU law: the question of the legal basis and the source-quality of (general) principles

What do these legal philosophical findings mean for the question of the allocation of legislative powers and the need for a legal basis in EU law? Needless to say, an extensive account of interpretation challenges the horizontal separation of powers within the EU and the vertical allocation of powers between the EU and its Member States. Many legal scholars have so far

⁶³ Dworkin, *The Law's Empire*; Hart, *The Concept of Law*, Post-script; MacCormick, *Legal Reasoning*, 188.

⁶⁴ Esser, *Grundsatz und Norm*, 62ff.

⁶⁵ Hart, *The Concept of Law*, 259; MacCormick, *Legal Reasoning*, 188.

accepted the broad notion of the Court's mandate,⁶⁶ which is often linked to the needs of the evolutionary *sui generis* nature of the EU. Yet, the situation seems more complex.

General principles are judicially driven and lack a written legal basis except the few instances laid down in the Treaties. The need for a legal basis as derived from the principle of conferral serves to determine the validity of an EU law act. The principle of conferral describes the empowerment of the EU to adopt acts in fields of law that would otherwise be reserved for the Member States, herewith dividing the powers between the EU and its Member States and ensuring that an act adopted at the EU level in the absence of an appropriate legal basis could be declared void *ab initio*. It is simplistic, however, to mobilize judicial activism rhetoric in situations in which the CJEU recognizes general principles without grounding them on a legal basis.

Institutional concepts that allocate powers do not fit into the merit-based mind-set of adherents of the aprioristic notion of principle. Instead of providing a justification for the recognition of principles, they dub the judicial activity "discovery" of allegedly pre-existing norms following from interpretation and thereby avoid the question of the limits of the judicial activity. Underlying this approach is the assumption that the legal system is already complete and provides answers for all emerging questions.

At the other end of the spectrum, legal positivist approaches may recognize the need for judicial law-making in concrete disputes flowing from gaps in the law and involving judicial discretion in one form or another, thereby leading to the creation of general principles that are not necessarily confined by the scope of the legislative powers of the EU.⁶⁷ The roots of the competence question lie in the objective to constitutionally anchor new legislation. Yet, general principles are not mentioned among the instruments laid down in Article 288 TFEU. It has been affirmed that the principles are laid down neither by empowering provisions nor by relevant secondary legislation.⁶⁸ What remains though is their judicial recognition notwithstanding the possible codification of judicially recognized principles.⁶⁹

In this context, there are two options: either a general principle is recognized as a source in its own right or the judicial precedent is recognized as a source of EU law. In the latter case, the question arises whether (general) principles are being incorporated and transformed into the existing law by one single judgment or by a whole chain of judgments.

One could argue that the question of whether general principles are sources of law in their own right even beyond the traditional canon does not require an answer if the judicial precedent that

⁶⁶ Bengoetxea, *Legal Reasoning in the European Court of Justice*, 45; Tridimas, *General Principles*, 20; Herdegen, *General Principles*, 15; Groussot, *General Principles*, 11; Koen Lenaerts and Jose Gutiérrez-Fons, "The Constitutional Allocation of Powers and General Principles of EU Law," *Common Market Law Review* 47, no. 6 (2010): 1632.

⁶⁷ Herdegen, *General Principles* (2000 and 2008); Groussot, *General Principles*, 9; to a certain extent Bengoetxea, *Legal Reasoning in the CJEU*; Lenaerts and Gutierrez-Fons, "The Constitutional Allocation of Powers and General Principles," 1631; Tridimas, *General Principles*, 18.

⁶⁸ CJEU, Case C-555/07, *Küçükdeveci v Swedex GmbH*, nyr, 20; CJEU, Case C-147/08, *Jürgen Römer v Freie und Hansestadt Hamburg*, nyr, 59.

⁶⁹ CJEU, Case C-144/04, *Werner Mangold v Ruediger Helm*, 2005 E.C.R. I-9981, para 76; confirmed in Case C-555/07, *Küçükdeveci v Swedex GmbH*, nyr; Case C-147/08, *Juergen Römer v Stadt Hamburg*, nyr, 59-60.

includes the recognition of a given general principle constitutes a source of law. If one does not agree with that (e.g., because one argues that the judicial recognition is merely declaratory according to the aprioristic model of principle or because one refuses to acknowledge the source-quality of a judicial precedent in EU law), the general principle as such moves into the foreground.

According to a broad notion of a legal source as encompassing anything upon which courts base their arguments, one could affirm that general principles are sources of law in their own right.⁷⁰ So far, commentators have relied on the label of a “distinct” category among the sources,⁷¹ or referred to a category *sui generis* that stands “outside the formal sources of law”⁷² in order to take due account of the need for sources beyond the traditional canon. Although there are good reasons for justifying the existence of general principles in EU law where the written law is silent, the following sections will underscore that this requires methodological rigor and a transparent approach to the teleology applied.

Traces of the two narratives of principles in the case law of the CJEU

The CJEU’s case law offers examples for both dominant narratives concerning the emergence of general principles. Instead of attempting to give a thorough account of the case law on various general principles,⁷³ the following sections will consider the recognition (or the lack of recognition) of general principles in the area of individual rights, administrative, and procedural law principles as well as fairly recent cases in the field of labor, company, and tax law. They reflect the most characteristic cases with constitutional relevance without providing for a complete survey of the case law. With the divergent conceptions of general principles seen as two ends of a continuum, there is a clear preference in these more recent cases for positivistic approaches.

The discovery of an aprioristic principle

In some cases, the Court has preferred the path of discovery as laid out previously, meaning that it merely discovers allegedly pre-existing general principles. This holds true mainly for the early fundamental rights cases in which several EU fundamental rights were considered “enshrined”⁷⁴ in

⁷⁰ Answering the question of the source quality in the affirmative, Toth, “Human Rights as General Principles of Law, in the Past and in the Future,” 75; Bruno De Witte, “Institutional Principles: A Special Category of General Principles of EC Law,” in *General Principles of European Community Law*, eds. Bernitz and Nergelius, 143; T. Koopmans, “General Principles of Law in European and National Systems of Law: A Comparative View,” in *General Principles of European Community Law*, eds. Bernitz and Nergelius, 25; explicitly adopting a broader concept of a source of law beyond the coerciveness and command as any standards upon which courts base their arguments, see Bengoetxea, *Legal Reasoning in the CJEU*, at 22, 42, 68, 123; AG Mazák in Case C-411/05, *Palacios de la Villa v Cortefiel Servicios SA*, 2007 E.C.R. I-8531, para 86, speaking of a “source of primary law;” Lenaerts and Gutiérrez-Fons, “The Constitutional Allocation of Powers and General Principles,” 1629.

⁷¹ Tridimas, *General Principles*, 1-2.

⁷² Jacobs in Tridimas, *General Principles*, preface.

⁷³ For more comprehensive works, see Ulf Bernitz, Joakim Nergelius, and Cecilia Cardner, eds., *General Principles of EC Law in a Process of Development* (The Hague: Kluwer, 2008); Groussot, *General Principles*; Tridimas, *General Principles*; Ulf Bernitz and Joakim Nergelius, eds., *General Principles of European Community Law: Reports from a Conference in Malmö, 27-28 August 1999* (The Hague: Kluwer, 2000).

⁷⁴ CJEU, Case C-29/69, *Stauder v. City of Ulm*, 1969 E.C.R. 419, para 7.

or an “integral part”⁷⁵ of the general principles of European Community (EC) law that it likewise implicitly regarded as pre-existing and inherent in the law that the Court committed itself to observe.⁷⁶ In other words, the Court started from a double assumption, namely that general principles are inherent in the legal order beyond the codified word and that fundamental rights form an integral part thereof. Even before the first mention of the “general principles” in *Stauder*, the Court had made clear that national constitutional rights could not be invoked against EU law before the Court,⁷⁷ so the rationale of the discovery was rather a federal concern.

This approach suggests that the existence of the respective rights was pre-supposed (i.e., immune from the need for justification) whereas their exact shape seemed left for the Court to determine. Criticism and resistance concerning related ontological or methodological aspects have rarely emerged in the context of fundamental rights, possibly because of the functions of the respective principles that consisted of confining powers derived from EU law. Moreover, by adding Article 6 (3) TEU with the Treaty of Maastricht, the Member States created a legal basis at least for the category of general principles as fundamental rights as such in the Treaty. In other cases, the Court discovered principles that lacked the attribute of generality when it regarded as “inherent in the system of the Treaty” the existence of a “principle of state liability” for breaches of EU law.⁷⁸ This approach was characteristic for some early cases but was gradually replaced by an approach that developed general principles on the basis of other sources, such as comparative studies or international treaties.⁷⁹

The emphasis on the sources of inspiration of the general principle

Whilst in the very early cases the recognition of general principles was based on ultimate premises that were by no means self-evident, the Court increasingly (albeit gradually) complemented the rather apodictic statements by references to the sources that inspired, shaped, and concretized the principles. This trend suggests that the Court preferred to ground its findings in some sources, although in the majority of the cases, those sources lacked binding force. On the one hand, a distinction is to be made between the reliance on national law or the European Convention on Human Rights (ECHR) that is stipulated by the Treaty⁸⁰ and all the other cases, where the Court

⁷⁵ CJEU, Case C-4/73, *Nold*, 1974 E.C.R. 491, para 13.

⁷⁶ CJEU, Case C-11/70, *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle Getreide*, 1970 E.C.R. 1125, para 4.

⁷⁷ CJEU, Case C-1/58, *Stork & Cie. / ECSC High Authority*, 1959 E.C.R. 17 (The applicant claimed that the High Authority had violated the right of free development of the person and the freedom of profession enshrined in the German Basic Law).

⁷⁸ CJEU, Joined cases, C- 6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and Others*, 1991 E.C.R. I-5357, para 35; CJEU, Joined cases, C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame III*, 1996 E.C.R. I-1029, para 31; Case C-224/01, *Gerhard Köbler v. Austria*, 2003, E.C.R. I-10239, paras 30 et seq. The Court relied on a complex chain of assumptions that were not in themselves proven or justified. In *Francovich*, the Court took as a starting point the recognition of the rights and obligations of states and individuals flowing from EU law as stated in *Van Gend en Loos* (which in itself contains far-reaching policy assumptions concealed behind the mask of the allegedly a-political law and which are to date not entirely deciphered) and emphasized the need for their effective enforcement that justified the recognition of state liability in EU law.

⁷⁹ Similar, EU law, Paul Craig and Gráinne de Búrca, *EU Law*, 5th ed. (Oxford: Oxford University Press, 2011), 367.

⁸⁰ E.g., the current Article 6 (3) TEU or Article 340 (2) TFEU.

has recourse to those sources without any basis in the Treaty. On the other, the binding⁸¹ and non-binding effect of the external sources is to be distinguished. The current section is devoted to general principles derived from sources that are formally speaking non-binding for the EU at large, whereas the next one will deal with legally binding sources that might contribute to the development of general principles (or fail to do so).

(i) *International law as source of inspiration and fundamental rights as a special case*

As a general rule, the sources from which the Court draws inspiration in a broad and often unspecified manner include the national laws of the Member States, global and regional international treaties, and related acts (i.e., for the EU, formally speaking, non-binding sources).⁸² As another general rule, references have often remained selective or confined to the mention of key provisions in national law⁸³ and have included the unspecified recourse to the ECHR that often exclude the case law of the European Court of Human Rights (ECtHR).⁸⁴ Therefore, the Court for

⁸¹ E.g., the ECHR in case of accession of the EU or where EU law expressly refers to the applicability of national law.

⁸² CJEU, Case C-4/73, *Nold*, 1974 E.C.R. 491, para 13: “in safeguarding these rights, the court is bound to draw inspiration from constitutional traditions common to the member states, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the constitutions of those states . Similarly, international treaties for the protection of human rights on which the member states have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of community law.”

⁸³ CJEU, Case C-44/79, *Lieselotte Hauer v Land Rheinland Pfalz*, 1979 E.C.R. 1125 , para 20 (on the property right in 9 Member States); CJEU, Case C-155/79, *AM & S Europe Limited v Commission of the European Communities*, 1982 E.C.R. 1575, paras 18-22 (on the legal professional privilege, see also AG Warner in *AM&S*; in para 18 with regard to the confidentiality of communications between lawyers and their clients in competition proceedings, the Court ruled that the existing secondary legislation (which was not relevant for the applicant’s claim in the case at hand) “do[es] not exclude the possibility of recognizing, subject to certain conditions, that certain business records are of a confidential nature. Community law, which derives from not only the economic but also the legal interpenetration of the member states, must take into account the principles and concepts common to the laws of those states concerning the observance of confidentiality, in particular, as regards certain communications between lawyer and client.” Interestingly, three decades later, an extension of this principle was sought unavailingly on the basis of an apparent evolution in the national and European legal landscape (*AKZO* case). On the basis of a very detailed analysis of the AG on the law and practice in nearly all Member States and the U.S. and legislative developments at the EU level, the Court refused to extend the protection of the communications to in-house lawyers because it considered the slight changes in the laws of the Member States in that direction not as uniform and clear enough tendencies, CJEU, Case C-550/70 P, *Akzo Nobel Chemicals and Akcros Chemicals v. European Commission*, nyr, paras 71-72, 83 et seq.; CJEU, Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der. Bundesstadt Bonn*, 2004 E.C.R. I-9609, paras 33-34 and AG Stix-Hackl, Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der. Bundesstadt Bonn*, 2004 E.C.R. I-9609, paras 83-86 (providing for a comparative analysis, despite silence in the ECHR on human dignity); CJEU, Case C-249/96, *Grant v South-West Trains Ltd*, 1998 E.C.R. I-621, para 32 (providing for a superficial comparative analysis on anti-discrimination protection in case of same sex marriage); CJEU, Joined cases C-46/87 and C-227/88, *Hoechst AG v. Commission*, 1989 E.C.R. 2859, para 17 (on the rights of the inviolability of the home as a right of defense for undertakings in competition proceedings); CJEU, Case C-144/04, *Werner Mangold v Rüdiger Helm*, 2005 E.C.R. I-9981, para 76 and CJEU, Case C-555/07, nyr, *Küçükdeveci v Swedex GmbH*, paras 59-61 (both on the prohibition of age discrimination).

⁸⁴ CJEU, Case C-44/79, *Lieselotte Hauer v Land Rheinland Pfalz*, 1979 E.C.R. 1125, paras 14-15 (as a starting point for the analysis in the context of the right to property); CJEU, Case C- 222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster*, 1986 E.C.R. I-1651, para 18 (on equal treatment in employment); CJEU, Case C-260/89, *ERT*, 1991 E.C.R. I-2925, para 41 (on freedom of expression); CJEU, Opinion 2/94 on the accession by the Community to the ECHR, 1996 E.C.R. I-

a long time merely paid lip-service to the ECHR as enjoying special significance. References to other international agreements of regional or global scope have proved particularly difficult to apply not least because of the need to ascertain which Member States had signed the respective agreement and where it had entered into force.⁸⁵ Since the adoption of Opinion 2/94,⁸⁶ references to the ECHR have increased in quantitative terms and have gained significance in qualitative terms as to the level of protection.⁸⁷ Yet, in many cases, a plethora of often unspecified sources has remained at the basis of the recognition of a given general principle, which includes references to the unbinding Charter of Fundamental Rights since its proclamation in 2000 and before its entry into force in 2009.⁸⁸ In relation to the general principle of equal treatment,⁸⁹ a chain of cases from *Mangold* via *Kücükdeveci* to *Römer* suggests that a plurality of sources of inspiration underlying a given general principle may be rooted in the unexplored interplay among general principles, secondary legislation, and, in some cases, provisions of the Charter of Fundamental Rights.⁹⁰ Most recently, one can perceive a general trend according to which the CJEU assigns priority to the now binding Charter of Fundamental Rights and includes more substantiated references to the ECHR and its interpretation by the ECtHR as well as references to national law.⁹¹ Although, formally speaking, the references to the ECHR via

1759, para 33; CJEU, Case C- 94/00, *Roquette Frères*, 2002 E.C.R. I-9011, para 29. (Inviolability of the home extended to business premises in competition proceedings).

⁸⁵ According to the early *Nold* case (CJEU, Case C-4/73, *Nold*, 1974 E.C.R. 491, para 13), the fact of being a signatory suffices for a source to serve as a source of inspiration, which means that the respective treaties must not yet have entered into force. See further Craig and de Búrca, *EU law*, 367-368, referring to positive examples such as the *Defrenne* Case 149/77, *Defrenne*, 1978 E.C.R. 1365, para 26 (references to the European Social Charter and ILO Convention) or Case C-540/03, *EP v Council*, 2006 E.C.R. I-5769, paras 37-39, 57 and 107 (in relation to the family reunification Directive: references to the ECHR, EU Charter, the ICCPR, International Convention the Rights of a Child, and other Council of Europe human rights instruments). Negative examples in which international agreements were not relied on include, e.g., CJEU, Case C-249/96, *Grant v South-West Trains Ltd*, 1998 E.C.R. I- 641, paras 44-47 (rejection of an opinion given by the ICCPR Human Rights Committee) or the Court's appeal decision in the *Kadi* cases C-402/05 and C-415/07 P, *Kadi* and *Al Barakaat International Foundation v. Council and Commission*, 2008 E.C.R. I-6351, contrary to the General Court's decision T-315/01 *Kadi and Al Barakaat International Foundation v. Council and Commission* (various international human rights instruments were mentioned by the General Court, but not by the CJEU); CJEU, Case C-144/04, *Werner Mangold v Ruediger Helm*, 2005 E.C.R. I-9981, 76 (in the context of the prohibition of age discrimination, the CJEU fails to specify the instruments it alludes to; a more detailed analysis of the sources mentioned reveals that there is little consensus with respect to the existence of the prohibition of age discrimination in horizontal relationships, see further Metzger, *Allgemeine Rechtsgrundsätze in Europa*).

⁸⁶ CJEU, Opinion 2/94, 1996 E.C.R. I-1759.

⁸⁷ Groussot, *General Principles*, 61ff., 71 with regard to references to ECHR and 79 with regard to ECHR jurisprudence.

⁸⁸ E.g., CJEU, T-54/99, *max Mobil*, 2002 E.C.R. II-313, para 48 as the first reference.

⁸⁹ Due to differences between the protection of equal treatment in the EU and under the ECHR (see further Besson, "Gender Discrimination under EU and ECHR Law"), the Court essentially relies on the Charter and secondary legislation in the area of equality law.

⁹⁰ CJEU, Case C-144/04, *Werner Mangold v Ruediger Helm*, 2005 E.C.R. I-9981, paras 74-76; CJEU, Case C-555/07, *nyr*, *Kücükdeveci v Swedex GmbH*, paras 20-21, 50-51; CJEU, Case C-147/08, *Jürgen Römer v Freie und Hansestadt Hamburg*, *nyr*, paras 59-60.

⁹¹ See already CJEU, Case C-249/96, *Grant v South-West Trains Ltd*, 1998 E.C.R. I-621 (references to decision of European Human Rights Commission and the ECtHR to support the rejection of the general principle of non-discrimination on grounds of sexual orientation, para 33-34); CJEU, Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Germany*, *nyr*, (reference to Article 47 of the Charter and via Article 52 (3) of the Charter to case law of the ECtHR in the

Article 6 (3) TEU or the Charter still lack binding force, it has become almost unjustifiable not to take those two instruments seriously, notwithstanding the option to consciously deviate from the ECHR for the sake of the autonomy of EU law.⁹² There is a tendency towards convergence that aligns other sources such as general principles to the respective Charter provision; such alignment may then serve as an authoritative starting point for embarking on an in-depth analysis of the ECHR and its interpretation by the ECtHR.⁹³ General principles may lose significance where there is codified law on a given matter. They will retain an important role as unenumerated judicially driven creatures, however, where all other sources are silent. As the Court retains the freedom and flexibility to decide how to use the various materials available, a clear-cut distinction between legally binding and non-binding provisions has not yet been achieved.

Whereas comparative studies are time-consuming, the reliance on international treaties such as the ECHR and its interpretation by the ECtHR as a reflection of a common denominator is less so. Since the entry into force of the EU Charter of Fundamental Rights, full-fledged comparative analyses will most likely become less frequent in the area of fundamental rights. Especially since the entry into force of the Treaty of Lisbon, a nuanced picture requiring a separate treatment of fundamental rights and other general principles seems in order. This is essentially due to the frequent interaction of the general principles incorporating fundamental rights with other norms, which is not as common or relevant to other areas of EU law.

(ii) *The role of national laws and the comparative method*

In the absence of other, more readily available sources of inspiration, the national laws and legal traditions of the Member States serve as the basis from which to derive common European general principles. The early recognition of administrative law⁹⁴ and procedural law⁹⁵ principles (the latter often being at the same time fundamental rights) may serve as examples, whilst the recognition

context of legal aid to legal persons as a reflection of the right of a legal person to effective judicial protection, paras 31ff.; see also AG Mengozzi in DEB, paras 61 et seq., providing for a comprehensive overview of the situation in international law and under the ECHR and a more limited comparative overview of the laws of selected Member States (that does not show a common denominator); AG Kokott, Case C-550/07 P, Akzo Nobel Chemicals and Akros Chemicals v. European Commission, nyr, paras 100 et seq. and CJEU, Case C-550/07 P, Akzo Nobel Chemicals and Akros Chemicals v. European Commission, nyr, paras 69 et seq., with frequent references to the very comprehensive comparative analysis of AG Kokott in the context of the legal professional privilege in competition proceedings; AG Trstenjak, Case C-282/10, Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre, nyr (with regard to the right to paid annual leave); CJEU, Case C-400/10 PPU, J McB (with regard to a father's rights of custody, paras 49 et seq.).

⁹² Art 52 (3) Charter and its explanations.

⁹³ CJEU, Case C-208/09, Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien, nyr, para 89; CJEU, Case C- 447/09, Prigge v. Deutsche Lufthansa, nyr, para 38 (see also para 26 of the opinion of AG Villalón); AG Kokott, Case C-236/09, Association Belge des Consommateurs Test—Achats and others v Conseil des ministres, nyr, para 29; CJEU, Joined cases C-297/10 and C-298/10, Hennigs, nyr, para 47; CJEU, Case C-279/09 DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Germany, nyr.

⁹⁴ E.g., CJEU, Joined cases C-7/56, 3/57-7/57, Algera & Others v. Assembly, 1956 E.C.R. 39, 55 (with regard to the revocability of administrative acts).

⁹⁵ CJEU, Case C-155/79, AM & S Europe Limited v Commission of the European Communities, 1982 E.C.R. 1575, para 18; CJEU, Case C-555/07 P, Akzo Nobel Chemicals and Akros Chemicals v. European Commission, nyr, paras 71-72, 83 et seq.

of those principles was at times justified by invoking the objective to avoid a denial of justice.⁹⁶ In other cases, the Court did not refer to them as “principles” but rather relied on their content as a part of the reasoning.⁹⁷

Where general principles are inspired to a lesser degree by other EU law norms or international norms that already reflect a sort of common denominator, it becomes crucial to justify the recognition of general principles by reference to national law and the comparative method. In this context, it should be stressed that the soul of general principles is doubtlessly more complex at the supranational level, where the identification of ultimate authority of the law is more complex than at the national level. In addition, tensions between constitutional and, at the same time, often hierarchical accounts of the interplay between the national and the supranational level on the one hand and horizontal pluralistic accounts on the other inform the views on the nature of the EU and the source of its ultimate authority.⁹⁸ For reasons of conceptual and linguistic diversity and a strongly practitioner dominated scholarship, a well-elaborated EU legal method that includes a theory of adjudication that is able to conceptualize the use of national law for the purposes of constructing a common European legal order has yet to be shaped. This applies to the few codified instances of general principles and beyond.

For constitutional approaches that may be based on the Kelsenian “*Grundnorm*” situated in national or international law,⁹⁹ the national law that may inspire the recognition of principles at the EU level is not, strictly speaking, “foreign” authority but rather part of the same system.

For the legal pluralists on the other end of the spectrum, national sources are, formally speaking, foreign and non-binding, but foundational for the EU’s legal order as a matter of fact. Although they argue in one way or another that authority is contested between the various levels of governance due to mutually conflicting claims of authority, the conflict may be less virulent in the context of general principles of EU law, given that EU law fails to provide for an obvious solution to the case at hand. In the case of the recognition of general principles at EU level, the EU level imposes the teleology upon the product derived from the national solutions; in other words, it guides the selection of the sources of inspiration of the EU law principle. In this case, legal pluralist

⁹⁶ CJEU, Joined cases C-7/56, 3/57-7/57, *Algera & Others v. Assembly*, 1956 E.C.R. 39, 55 (on the revocability of administrative acts); AG Lagrange CJEU, Case C-8/55, *Fédération Charbonnière de Belgique*, 1955 E.C.R. 292, with respect to the proportionality principle, p. 277.

⁹⁷ CJEU, Case C-8/55, *Fédération Charbonnière de Belgique*, 1955 E.C.R. 292, with respect to the proportionality principle.

⁹⁸ E.g., Jones, “Legal Nature of the European Community,” 4; N.W. Barber, “Legal Pluralism and the European Union” *European Law Journal* 12, no. 3 (2006): 306-329 [\[CrossRef\]](#); De Búrca and Weiler, *The Worlds of European Constitutionalism*; McCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth Law, State, and Practical Reason*; Avbelj and Komarek, *Constitutional Pluralism in the European Union and Beyond*; J. M. Smits, “A Radical View on Pluralism,” in *Pluralism and European Law*, ed. Niglia Leone (Oxford: Oxford University Press, 2012); Ingolf Pernice, “The Treaty of Lisbon: Multi-Level Constitutionalism in Action,” *Columbia Journal of European Law* 15 (2009): 349; Weyland, “The Application of Kelsen’s Theory of the Legal System to European Community Law: The Supremacy Puzzle Resolved.”

⁹⁹ Hans Kelsen, “Die Einheit von Völkerrecht und staatlichem Recht,” *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 19 (1984): 234. For a helpful overview of the local constitutionalist, global constitutionalist, and pluralist approaches, De Búrca and Weiler, *The Worlds of European Constitutionalism*, in particular Weiler’s prologue, 8ff., Halberstam’s contribution, 150ff., de Búrca’s contribution, 105, 126, and Krisch’s one, 203ff.

approaches seem more inclined to respect divided allegiances and preferences in post-national societies¹⁰⁰ such as the EU as a starting point. In the context of the recognition of legal principles, pluralism as a heterarchical phenomenon has a strong analytical and empirical connotation. Yet, the normative component flows from the EU level itself. Pluralism as a basis for bottom-up creations of general principles no doubt enhances legitimacy in its dimension of input legitimacy.¹⁰¹ However, radical pluralism is not appropriate where autonomous notions of EU law need to be created. Instead, a departure from domestic instruments and their mere co-existence is necessary in this context given that the goal of the EU law concepts is to coordinate and harmonize the underlying national systems.¹⁰²

Inferring legal principles from the solutions for which national laws provide requires a thorough comparative analysis and a convincing criterion for selecting and shaping the preferred solution. In principle, this requirement applies to public and private law alike given that EU law does not know such a distinction. The CJEU conceives of the recognition of principles as part and parcel of legal interpretation,¹⁰³ whilst others view it more specifically as a reflection of the “comparative method.”¹⁰⁴ When no law exists to cover a given situation, the EU courts look to the national legal orders and ideally reveal what serves as their “toolbox” and method for selecting the most suitable solution for the EU legal system. Although the use of comparative analyses is not always visible, the comparative method underlies all cases due to each judge’s different background so that the deliberations constitute a “living comparative law in action.”¹⁰⁵ Beyond that, comparative studies can be found in the opinions of the Advocates General, in the comparative examinations from the Research and Documentation Service of the Court, the Commission as a party to the proceedings or an *amicus curiae*, or the Member States and others as parties or interveners.¹⁰⁶ As it has been remarked, “general principles are children of national law but as brought up by the Court, they become *enfants terribles*” that are “extended, narrowed, restated, transformed by a creative and

¹⁰⁰ Nico Krisch, *ibid.*, 203, 204.

¹⁰¹ Lenaerts and Gutiérrez-Fons, “The Constitutional Allocation of Powers and General Principles”; Poiares Maduro, “Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism,” 1630.

¹⁰² George Letsas, “The Truth in Autonomous Concepts: How to Interpret the ECHR,” *European Journal of International Law* 15(2004), at 285 in context of the ECHR.

¹⁰³ In the context of the principle of state liability, see CJEU, Cases C-46/93 and 48/93, *Brasserie du Pêcheur and Factortame*, 1996 E.C.R. I-1029, paras 24 et seq. With regard to the “existence and extent of State liability for damage ensuing as a result of a breach of obligations incumbent on the State by virtue of Community law,” the Court ruled that these are “questions of Treaty interpretation which fall within the jurisdiction of the Court.” In the absence of relevant rules at EU level, “it is for the Court, in pursuance of the task conferred on it by Article [19] TEU of ensuring that in the interpretation and application of the Treaty the law is observed, to rule on such a question in accordance with generally accepted methods of interpretation, in particular by reference to the fundamental principles of the Community legal system and, where necessary, general principles common to the legal systems of the Member States.”

¹⁰⁴ Konrad Zweigert, “Grundsatzfragen der europäischen Rechtsangleichung, ihrer Schöpfung und Sicherung,” in *Vom Deutschen zum Europäischen Recht*, eds. Ernst von Caemmerer, Arthur Nikisch, and Konrad Zweigert (Tübingen: Mohr Siebeck, 1963), 417.

¹⁰⁵ C. N. Kakouris, “Use of the Comparative Method by the Court of Justice of the European Communities,” *Pace International Law Review* 6 (1994): 267, 277.

¹⁰⁶ *Ibid.*

eclectic judicial process.”¹⁰⁷ The determination of a sufficient level of consensus and commonalities has not always been easy to predict because the Court does not consider it to be an arithmetic exercise.¹⁰⁸ Irrespective of that, the case law shows that as a matter of principle, this consensus is not a static concept.¹⁰⁹

In other words, the comparative materials are viewed as an *école de vérité*,¹¹⁰ as a “laboratory” of ideas¹¹¹ or a collection of data¹¹² to be evaluated. The discursive potential of the comparative method is to be viewed against the backdrop of time, language, and budget constraints. The identification of the most suitable solution is a thorny exercise that may be based on a common denominator (floor-theory) or, more rarely, on the highest standards (ceiling-theory); in either case, the process is basically driven by the constitutional goals of the receiving system as such. The Court has stated explicitly in a very early case where the applicant in the national proceedings invoked national fundamental rights against the forfeiture of an export license that the “protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.”¹¹³

The least resistance from the Member States can be expected if the CJEU opts for the floor-theory approach so that all Member States’ legal solutions to a problem are, in theory, taken into account. Floor-theories respect the will of the respective majority at the national level.¹¹⁴ Yet, even the establishment of a common denominator is a considerably difficult task given that an in-depth comparative analysis will often reveal similarities on the surface but important differences

¹⁰⁷ Tridimas, *General Principles*, 6.

¹⁰⁸ CJEU, Case C-11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125, para 4; AG Maduro, Joined cases C-120 and 121/06, *Fabbrica italiana accumulatori motocarri Montecchio SpA*, 2008 E.C.R. I-6513, para 55; AG Kokott, Case C-550/07 P, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v Commission*, nyr, paras 94 et seq.

¹⁰⁹ AG Kokott, Case C-550/07 P, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v Commission*, nyr, paras 100 et seq and CJEU, Case C-550/07 P, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v Commission*, nyr, paras 65 et seq. with respect to a re-interpretation of the scope of the legal professional privilege in competition law proceedings towards the inclusion of in-house lawyers; AG Jääskinen, Case C-147/08, *Jürgen Römer v Freie und Hansestadt Hamburg*, nyr, paras 127 et seq. on the equality principle concerning sexual orientation.

¹¹⁰ Zweigert Konrad and Kötz Hein, *An Introduction to Comparative Law* (Oxford: Clarendon Press, 1998), 15.

¹¹¹ Meinrad Hilf, “The Role of Comparative Law in the Jurisprudence of the Court of Justice of the European Communities,” in *The Limitation of Human Rights in Comparative Constitutional Law*, eds. A. de Mestral et al. (Cowansville, Qc.:Yvon Blais,1986), 550; Koen Lenaerts, “Interlocking Legal Orders in the European Union and Comparative Law” *International and Comparative Law Quarterly* 52 (2003) : 873-908. [[CrossRef](#)]

¹¹² Mauro Cappelletti, Monica Seccombe, and J.H.H. Weiler, “Integration Through Law: Europe and the American Federal Experience. A General Introduction,” in *Integration Through Law*, eds. Cappelletti Mauro, Seccombe Monica, and Weiler J.H.H. (Berlin: de Gruyter, 1985), Introduction.

¹¹³ CJEU, Case C-11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide*, 1970 E.C.R. 1125, para 4.

¹¹⁴ Letsas, “The Truth in Autonomous Concepts: How to Interpret the ECHR,” 296ff.

underneath.¹¹⁵ Where a common denominator is not possible, deference to the national level seems to prevail, and autonomous concepts are at times rejected.¹¹⁶

(iii) *The role of the constitutional goals of EU law*

Accommodating the final product to the structure and the objectives of the EU raises three kinds of concerns: first, norms incorporating constitutional goals are frequently open-textured, or it is unclear whether they are legally binding and enforceable; second, there are several constitutional goals (today even more so than at the times of *Internationale Handelsgesellschaft*); and third, they may follow rationalities that differ from the ones that characterize the same subject matter in national law.

As to the first and second concerns: different general principles import different sorts of content into the EU legal system. This means that the choice of the sources of inspiration for the recognition of general principles and also the comparative analysis is guided by the overall teleology of the legal system. This is where and why the overall teleology of legal systems is particularly significant. By drawing from the preamble, the Treaty articles, or case law, the plurality of constitutional goals of the EU as displayed in Articles 2 and 3 TEU is reflected in the variety of substantive driving forces that underpin legal principles, which requires prioritization on a case-by-case basis. In the EU context, there is disagreement about the proper account of EU integration, which is also due to the rather cryptic fashion in which the Court approaches teleological interpretation. In earlier days, it was relatively easy to invoke the internal market goal as the prevailing purpose of the law and the Court's jurisprudence.¹¹⁷ More recently, the complexity of the means-end relationship underlying the construction of the internal market and the increasing multiplicity of goals displaying several constitutional objectives as values in their own right, such as citizenship or social policy goals,¹¹⁸ have obscured the identification of goals underlying the teleological interpretation.

With regard to the third concern, it is obvious, and one of the roots of the current economic, debt and identity crisis that the EU's legal framework has been based on economic rationalities.

¹¹⁵ Janneke Gerards, "Judicial Argumentation in Fundamental Rights Cases – the EU Courts' Challenge," in *European Legal Method(s) in a Multi-Level Legal Order*, eds. Ulla Neergaard and Ruth Nielsen (Djof: Copenhagen, 2012), 27-69.

¹¹⁶ CJEU, Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Germany*, nyr, paras 44 et seq. in the framework of Article 47 of the Charter on legal aid for legal persons as an element of the principle of effective judicial protection: "44 As the Advocate General pointed out in points 76 to 80 of his Opinion, examination of the law of the Member States brings to light the absence of a truly common principle which is shared by all those States as regards the award of legal aid to legal persons. However, in point 80 of that Opinion, the Advocate General also pointed out that, in the practice of the Member States which allow legal aid to be granted to legal persons, there is a relatively widespread distinction between profit-making and non-profit-making legal persons." On the fundamental right and general principle of human dignity, CJEU, Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, 2004 E.C.R. I-960934, para 34.

¹¹⁷ E.g., CJEU, Case C-26/62, *Van Gend en Loos v Administratie der Belastingen*, 1963 E.C.R., 1.

¹¹⁸ CJEU, Case C-43/75, (*Defrenne v Sabena*) *Defrenne II*, 1976 E.C.R. 455; CJEU, Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line*, 2007 E.C.R. I-10779; CJEU, Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet*, 2007 E.C.R., I-11767; for a struggle between the market-orientation and a citizenship approach, Case C-127/08, *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform*, 2008 E.C.R. I-6241 or AG Sharpston, Case C-34/09, *Zambrano v ONEm*, nyr.

This has been only gradually and half-heartedly replaced by a full-fledged constitutional approach which, most recently, has lost acceptance in light of the ongoing crisis. This means that comparative approaches organized according to subject matters that are rooted in a nation state construction that covers any conceivable area of law may conceptually clash with the functional (economic) integration paradigm. The shaky soul of consumer law and labor law at the EU level has so far not only prevented the EU from expanding its legislative competence in those fields but also explains the Court's reluctance to recognize general principles of EU law in contract law or labor law.¹¹⁹

The recognition of general principles of EC/EU law, particularly in the area of administrative and procedural law, has served to strengthen the rule of law and rendered the existing EU law operable and enforceable, in favor of private parties. This may have led to a greater degree of transparency on the side of the Court acknowledging in a more or less outspoken fashion the need to identify and fill gaps. In other cases, the driving force underlying the recognition of (general) principles has served substantive constitutional goals such as securing integration, which was often reinforced by the *effet-utile* argument.¹²⁰

In the very early cases on fundamental rights, one might be inclined to draw parallels to a Dworkinian rights approach as opposed to the reliance on the broader collective public interest or the overall EU integration goal as the driving forces behind the evolution of the general principles. Two caveats call for caution in this regard. On the one hand, the driving force behind the discovery of EU fundamental rights as one of the most important categories of general principles was the fear that Member States would use national fundamental rights as a yardstick to assess the legality of EU law—in other words, a federal issue. On the other hand, the concept of general principles in EU law has included from an early stage administrative and procedural law principles that are not necessarily linked to individual rights. Contrary to the earlier fundamental rights cases and the quite modest role of fundamental rights for the outcome of these cases, the more recent fundamental rights cases affirming the recognition of a prohibition of discrimination, such as *Mangold* and *Kücükdeveci* on grounds of age or *Römer* on grounds of sexual orientation, would fit better with a Dworkinian rights approach that is genuinely concerned with the role of the individual. Private law seems not yet ready to welcome general principles with their potentially far-reaching effects.

Compared to the very early fundamental rights cases, this section has demonstrated that the Court has become less concerned with the choice between aprioristic models and legal positivistic models of principle than with the justification of the recognition of a new principle as such, the display of its sources of inspiration, and with developing its substance. Until very recently, the exact link between multiple sources of inspiration, in particular the precise effect of the sources of inspiration, was hardly ever spelled out clearly. The following section shows that the Court

¹¹⁹ The clash of paradigms is one of the main challenges underlying the harmonization process of private law which extends to the role of labor relations in EU law that are hardly recognized as horizontal, contractual relationships, see further Kai Purnhagen, "The Architecture of Post-National European Contract Law from a Phenomenological Perspective – A Question of Institutions," *Centre for the Study of European Contract Law Working Paper Series No. 2011-11* (2011); Mak, "A Shift in Focus," 403-428; Constanze Semmelmann, "The Public-Private Divide in European Law" in *European Legal Method(s) in a Multilayered Legal Order v. Multi-level Governance: Different Theoretical and Methodological Approaches to the Study of EU Law*, eds. Ulla Neergaard & Ruth Nielsen (Copenhagen: Djof, 2012), 161-203; Hans Micklitz, "The Visible Hand of European Regulatory Private Law," *EUI Working Paper. Law Department* (2008).

¹²⁰ CJEU, Joined cases C-6/90 and C-9/90, Andrea Francovich and Danila Bonifaci and Others, 1991 E.C.R., I-5357.

increasingly prefers to be on the safe side within the meaning of best protecting its own legitimacy whenever possible.

Traces of the legal positivist model: the creation of and the refusal to create principles

In contrast to those cases that either display a “discovery” of general principles or focus on their formally non-binding sources of inspiration, legal positivism has left its traces in other cases in various ways.

One trace of legal positivism has been the implicit rejection of the concept that EU law represents a complete whole or a seamless web from the very instance of its inception. Instead, it is argued, there are gaps in the law and a need to fill them through law-making. This line of argument has not, however, been the rule and has only appeared openly in very few cases in such a transparent manner, mainly concerning the creation of administrative law¹²¹ and procedural law¹²² principles which was, at times, justified by invoking the need to avoid a denial of justice.¹²³ Compared to the aprioristic version of principle, this legal positivist-inspired approach enhances transparency but nonetheless would ideally require the Court to justify the identification of the gap and the need to fill it as well as to explain how to do so.

Positivistic traces have also been reflected where the Court has based the recognition of the precautionary principle as a general principle on the Treaty itself. In other words, the Court firmly anchored it in what the Member States have agreed on but nonetheless extended its scope beyond its sector-specific scope laid down in the Treaty.¹²⁴

A very recent trend has been the adoption of a crude legal positivist approach in order to refuse the recognition of a general principle.¹²⁵ The Court refused to recognize a general principle of equal treatment of shareholders vis-à-vis their company and a general principle of fiscal neutrality as a reflection of the general equal treatment principle.¹²⁶ The Court did not follow the parties in the national proceedings that had invoked the existence of these “general principles.” The Court did so essentially for two reasons that reflect part of the traditional legal positivist canon of arguments. First, according to the CJEU, such recognition could only have been derived from binding secondary law and not from non-binding soft law. In addition, the principles as invoked did not share the comprehensive and hence constitutional character of other general principles. With regard to the material from which a general principle can be derived or inferred, the underpinning argument of

¹²¹ E.g., CJEU, Joined cases C-7/56, 3/57-7/57, *Algera and others v Common Assembly*, 1956 E.C.R. 39, 55 with regard to the revocability of administrative acts.

¹²² CJEU, Case C-155/79, *AM & S Europe Limited v Commission of the European Communities*, 1982 E.C.R. 1575, para 18.

¹²³ CJEU, Joined cases C-7/56, 3/57-7/57, *Algera and others v Common Assembly*, 1956 E.C.R. 39, 55; AG Lagrange CJEU, Case C-8/55, *Fédération Charbonnière de Belgique*, 1955 E.C.R. 292, with respect to the proportionality principle, p. 277.

¹²⁴ CJEU, T-74, 76, 83-85, 132, 137, 141/00, *Artogodan v Commission*, 2002 E.C.R. II-4945 on the precautionary principle, laid down in Article 191 (2) TFEU, but extended by judicial interpretation beyond the Charter of environmental policy, paras 181-185.

¹²⁵ But see already CJEU, Case C-249/96, *Grant v South-West Trains Ltd*, 1998 E.C.R. I-621, paras 41-45.

¹²⁶ CJEU, Case C-101/08, *Audiolux SA e.a v Groupe Bruxelles Lambert SA*, 2009 E.C.R., I-9823; CJEU, Case C-174/08, *Nordic Construction Comp. Baumanagement GmbH*, 2009 E.C.R., I-10567

the Court seems to have been that general principles must remain connected as closely as possible to the Treaties or secondary legislation and not merely be inspired by a *lex ferenda*, that is intermediate or incremental or other non-binding documents. This leaves only a narrow margin for general principles and also confines their role to substantiating and systematizing functions with respect to other norms.

In those recent cases, the generality of a principle has evolved into the decisive criterion that requires a sufficiently comprehensive, overarching character as opposed to specific norms of limited scope. The Court appears to equate the generality with the constitutional character of a given principle.¹²⁷ The crucial argument in *Audiolux*—exhaustively laid out by AG Trstenjak—was the classical legal positivist proposition that the complex weighing of arguments in highly technical yet ideologically laden matters such as the question of the horizontal applicability of the equal treatment principle amounts to the very choice for the legislature.

Similarly, the Court expressly rejected the entitlement to a paid annual leave as a general principle à la *Mangold/Kücükdeveci* in the recent *Dominguez* case. Instead, it merely recognized the entitlement to paid annual leave as a sector-specific, a “particularly important principle of European Union social law from which there can be no derogations and whose implementation must be confined within the limits expressly laid down” by the relevant directives.¹²⁸ Ultimately, the Court employed the Directive 2003/88 on working time as the yardstick for reviewing national law. Surprisingly, it also avoided any reference to the Charter and hence a fully-fledged constitutional analysis, although this entitlement is mentioned in Article 31(2) of the Charter and the AG had extensively elaborated on this entitlement with regard to both its manifestation as a general principle of EU law and a fundamental right guaranteed in the Charter. This demonstrates that the Court clearly preferred the legislative act to any constitutional norm, which implies a clear preference for a *lex specialis*, the respect for the principle of conferral and ultimately safe solutions.

On the Court’s way to legal positivism, mention should also be made of the fact that the CJEU denied the existence of a general principle in the framework of the confidentiality of communications between lawyers and their clients in competition proceedings or the extension of its scope as invoked by the parties to the (national) proceedings in the recent case *Akzo*.¹²⁹ In other, more recent instances, legal positivist arguments insisting on the separation of powers and the emphasis on classic sources of law have served as a shield against the recognition or extension of EU law in areas where a consensus at the political level seemed to be lacking.

Conclusion: The CJEU on its way to legal positivism

The foregoing overview constitutes an attempt to sketch how the account of legal principles inspired by legal positivism and the account of legal principles derived from merit-based aspects have left their traces in EU law. A closer look at the genesis of general principles in EU law reveals

¹²⁷ CJEU, Case C-101/08, *Audiolux SA ea v Groupe Bruxelles Lambert SA*, 2009 E.C.R., I-9823.

¹²⁸ CJEU, Case C-282/10, *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*, nyr, para 16.

¹²⁹ CJEU, T-125/03 and 253/03, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v Commission*, 2007 E.C.R. II-3523, paras 170 et seq.; confirmed in the appeal judgment CJEU, Case C-550/07 P, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v Commission*, nyr, with respect to the extension of the legal professional privilege to in-house lawyers; AG Kokott, Case C-550/07 P, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v Commission*, nyr, paras 87 et seq.

that their ontological features and related problems represent to a considerable extent old wine in new bottles. The CJEU's case law is highly eclectic with regard to the recognition of a (general) principle. The choices the Court has made have depended on a bundle of criteria such as subject matter, allocation of legislative competence, or expected acceptance. Yet, the more recent tendencies suggest that there is no longer a strict dichotomy between a seemingly natural law-inspired model of principle and the model of principle as a product of judicial discretion that dominates the debate. Instead, the justification of the principles' recognition with regard to their sources of inspiration and the method of their coming into being have come to the fore. To a certain extent, this understanding of general principles may be viewed as a third school that relies to a large extent on comparative or international materials as a laboratory between natural law and legal positivism.¹³⁰

The Court has become more and more cautious about employing the apparent term of art of the "general principles" that could challenge the authority of the authors of primary law and the legislature in the context of secondary law. Instead, the Court clearly prefers reliance on the EU Charter of Fundamental Rights or secondary legislation. If and when the Court relies on principles, it still has to determine when a given principle enjoys a sufficient degree of generality denoting its comprehensive, overarching scope as opposed to a more specific one. On the one hand, where there is legislation, there may still be interaction between legislation and general principles. On the other hand, the existence of legislation increasingly serves as an argument *a contrario* to expressly or implicitly reject the existence of general principles or at least to employ less ambitious terminology. Hence, it is now not only the lack of legislative competence that prevents general principles from emerging but also the existence of codified norms in the area of fundamental rights or of more specific acts that increasingly seem to be given priority. In this context, general principles will retain an independent function where positive law is accidentally silent and also where the existing law is to be substantiated or where its central notions are to be elevated to a constitutional level.

¹³⁰ In relation to the comparative materials, see Cappelletti, Seccombe, and Weiler, "Integration Through Law," 5.